

***United States Court of Appeals
for the Second Circuit***



APPENDIX

No.

76-6107

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VERNICE DUBOSE, et al.,

Plaintiffs-Appellees,

v.

CARLA HILLS, et al.,

Defendants-Appellants.

CLAUDIA WALTER, et al.,

Plaintiffs-Appellees,

v.

CARLA HILLS, et al.,

Defendants-Appellants.

JANETTE LITTLE, et al.,

Plaintiffs-Appellees,

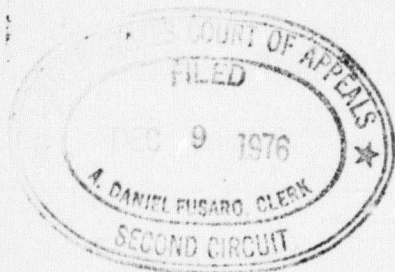
v.

CARLA HILLS, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JOINT APPENDIX



PAGINATION AS IN ORIGINAL COPY

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DISTRICT OFFICE	DOCKET NUMBER	FILING DATE MO. DAY YEAR	J	N/S	O	R	H 23	S	DEMAND OTHER	JUDGE NUMBER	JURY DEM	DOOR
205/2	75 303	09 25 75	2	890	1		1			0505		75

PLAINTIFFS

NURSE, Bernice, Susan Daigle,
individually and on behalf of
all others similarly situated

Consolidated
W/75-345
345
10.140

MR. JOSEPH BLUMENTHAL DEFENDANTS

HILLS, Carla, individually and
her official capacity as Secret
of the U.S. Dept. of Housing and
Urban Development; WINDHAM HEIGHTS
ASSOCIATES, a limited partnership
ANTHONY ASSOCIATES, a general partnership;
and SIMON KORNBERG, individual
and in his official capacity as
general partner in Windham Heights
Associates and Anthony Associates

CAUSE

National Housing Act, as amended by the Housing and Community Development Act of 1974
seeks declaratory and injunctive relief against a rent increase authorized by the SEC. of
HUD and about to be implemented by the private defs. alleges denied rights guaranteed by
U.S. Constitution and the National Housing Act.

ag

ATTORNEYS

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Manchester, Ct. 06040 (Simon Kornberg)
647-5

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Marjorie A Wilhelm (Carla Hill)
U.S. Atty Office
141 Church St.
New Haven, Conn.

Paul Michael Esq. Of Counsel
Dept of Justice
Civil Division
Washington, D.C. 20530

FILING FEES PAID	STATISTICAL DATA	
	DATE	RECEIPT NUMBER

UNITED STATES DISTRICT COURT DOCKET

DOCKET

No.	PROCEEDINGS
1.	Complaint, motion for temporary restraining order, motion for preliminary injunction and motion to proceed in forma pauperis filed. Motion to proceed in forma pauperis Granted, Blumenfeld, J. m 9-25-75.
2.	ORDER TO SHOW CAUSE, Blumenfeld, J. m9-25-75 (Hearing on 9/26 at 2:00pm) Summons issued and together with attested copies of O.S.C. and motion to proceed in forma pauperis, complaint and motions handed to Marshal for service.
	HEARING on Show Cause Order on Pltf. request for Restraining Order and for Injunction. Hearing cont. to 10-1-75 at 10:00 a.m. Counsel requested by Court to prepare by 10-1-75. proposed order. Proposed Finding of Fact and if appropriate, Proposed Certification of Class.
3.	Appearance of Rolland Castleman entered for def. Windham Heights, Anthony and Simon Konover.
4.	ORDER, Re: T.R.O., until 10-23-75. Blumenfeld, J. m10-1-75. Copies mailed.
5.	Protective Order: RE: Exhibit A shall be sealed. Blumenfeld, J. m10-1-75.
	Copies mailed to counsel.
6.	Appearance of Marjorie A Wilhelm entered for def. Carla Hills
7.	Marshal's returns showing service.
8.	Federal Defendants' Memorandum Brief in opposition to Plaintiff's Motion for a preliminary injunction. with Exhibits.
9a.	HEARING on Pltf. application for a preliminary injunction. Pltf. Memorandum of Law filed. T.R.O. currently in effect shall continue until a decision is reached on Application for Preliminary Injunction. DEC. RESERVED.
	Court Reporter's Notes of Proceedings held on Sept. 26, 1975, filed in Hartford. (Collard, R.)
9	Motion to Consolidate for Purposes of Trial (H75-345 & H75-346)
	Court Reporter's Notes of Proceedings held on October 23, 1975, filed in Hartford. (Collard, R.)
10	Endorsed on #9 to consolidate, Granted, Blumenfeld, J. m11/21/ Copies mailed Plaintiffs' Response to Federal Def. Motion to Consolidate.
11.	Ruling on Plaintiffs Motion for Preliminary Injunction, Blumenfeld, J. m 12-15 Copies mailed to counsel. (Injunction modified)
12.	Motion to Dissolve Preliminary Injunction filed by def.
13.	Memorandum Brief in Support of Motion To Dissolve Preliminary Injunctions
14.	Affidavit of Carla A. Hills.
15.	Affidavit of Robert C. Odle Jr.
16.	Affidavit of Thomas J. O'Connor
17	Motion for a Temporary Restraining Order and brief in support of motion filed by Plaintiffs
18	Plaintiffs Motion to Amend Class Certification.
19	Plaintiffs Brief to Amend Class Certification
20	Stipulation Re: reserve funds.
21.	ORDER TO SHOW CAUSE, Blumenfeld, J. m 3-2. Copy by certified mail to Assist. US Atty Wilhelm and mailed to counsel of record.
22	Motion for Preliminary Injunction
23.	Motion for Extension of Time filed by Pltf. (Re: one wk after trans. of to respond to def. motion to dissolve pre. injunction)
24.	Notice of Deposition filed by Pltf. (R. Odle on 3/15/76)
25.	Notice of Deposition filed by Pltf. (Carla Hills on 3/15/76)
26.	Certification of service of Stipulation & Order mailed to counsel.
27	Marshal's return showing service on def. Hills by cert. mail.
28	Notice of Filing of unsigned copy of affidavit of Carla Hills
29	Motion to Quash Subpoena and for Protective Order filed by def. C. Hills.
30	Federal Def. Memorandum Brief in support of motion to quash and for protective Order.

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF		DEFENDANT	DOCKET NO. 1175-
DUBOSE, Vernice, Et Al		HILLS, Carla, Et Al	PAGE 2 OF 2
DATE	NR.	PROCEEDINGS	
1976			
3-25	31	Plaintiff's Memorandum Brief in Opposition to Federal Defendant's Motion to Quash.	
3-25	32	Affidavit of Carla A. Hills.	
"	33	Notice Re: Motion of postponement of deposition, filed in District of	
3-26	34	Memorandum Brief of Federal Defendant in Opposition to Plaintiffs Motions	
"	35	Preliminary Injunction and Amended Class Certification.	
3-26	36	Affidavit of Fred W. Pfaender.	
3-29	37	Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction.	
4-15	38	HEARING on Plaintiffs motion for preliminary injunction & deft. motion	
4-21	39	miss class action. Dec. Reserved on both. Motion for leave to file amended	
4-22	40	complaint granted. Sub. Amended complaint filed w/out objection.	
4-23	41	Notice of Depositions (4-26-76 & 4-27-76 at 10:00 a.m.)	
4-26	42	Stipulation re: monies currently held or to be deposited in	
"	43	"reserve fund".	
5-18	44	Judge's endorsement re: Motion to Consolidate for Purposes of	
5-27	45	Docket Nos. H-75-303, H-75-345 and H 75-346 with H-76-160 -"G	
6-1	46	Blumenfeld, J. m4-22-76. Copies to counsel. (Filed in H-76-16	
6-4	47	Motion to Withdraw Affidavit of Robert C. Odle Jr.	
6-7	48	Affidavit of Fred W. Pfaender.	
6-10	49	Court Reporter's notes of Proceedings held on March 29, 1976	
6-15	50	filed in Hfd. (Collard, R.)	
6-21	51	ORDER, Blumenfeld J. m 4-26-76 Re: sub. affidavit of F. W. Pfaender,	
6-24	52	to counsel.	
		Transcript of Hearing held on 3/29/76. Collard, R.	
		Plaintiffs Motion for Production of Documents .	
		Ruling on Plaintiffs Motion to Amend Class Certification filed. Blume	
		m 5-27-76. Copies to counsel. (Pltf. class, persons who reside /or will res	
		the future, Deft. class owners of projects and HUL to make payments-private	
		to reimburse tenants)	
		Motion to Consolidate for Purposes of Trial filed by Def. (H	
		H-75-346, H-75-345, H-75-303, H-76-160).	
		Motion #45 GRANTED, Blumenfeld, J.	
		Memorandum of Law in Opposition to Federal Deft. Motion to Dissolve Prel	
		Injunction.	
		Certification of Service of Amended complaint .	
		Plaintiffs Submission of Amended Class Order.	
		Motion to Vacate Order and Dissolve Preliminary Injunction,	
		a Stay Pending Appeal, or for an Extension of Time for Compli	
		filed by Defs.	
		Memorandum in Support of Motion to Vacate Order and Dissolve	
		Injunction, or for Stay Pending Appeal, or for Extension of T	
		for Compliance.	
		Notice of Affidavit of James J. Tahash.	
		Affidavit of James J. Tahash.	

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 11-75
DUROSE, Vernice, Et Al	HILLS, Carlo, Et Al	PAGE 3 OF 3

DATE	NR.	PROCEEDINGS
1976		
6-28	53	Notice of Affidavit filed by Fed. Defs. of Bernard M. Cameron.
6-28	54	Affidavit of Bernard M. Cameron.
6-28	55	Motion for Clarification of Ruling on Pltfs.' Motion for a Preliminary Injunction.
6-28	56	Stipulation extending time for Compliance of Court's Order dated 5-27-76 until 8-1-76.
6-28	57	Order denying Government's motion to vacate the order of 5-28-76 and motion for a stay of orders pending appeal. Blumenfeld, J. m6-28-76. Copies mailed to counsel.
6-28	58	Plaintiffs' Response to Federal Defendant's Motion to Vacate and Dissolve Injunction or for a Stay Pending Appeal or for an Extension of Time.
6-30	59	Affidavit of John A. Dziamba.
6-29	60	Stipulation, filed re subsidy payments.
6-29	61	Stipulation, filed re monies in reserve fund.
6-28		HEARING on Motion to Vacate, denied. Motion to Stay pending Appeal, denied. Motion for extension of time to comply. Stipulated to until 7/31/76. Aff. Jemds J. Tahash filed.
7-2	62	Memorandum of Law in Support of Pltfs.' Motion for Clarification of Ruling on Pltfs.' Motion for a Preliminary Injunction.
7-8		Court Reporter's notes of Proceedings held on June 28, 1976 filed in Hfd. (Collard, R.)
7-7	63	Notice of Appeal filed. Copies of notice mailed to counsel of record. copy of notice and docket entries mailed to U.S. Court of Appeals and New Civil Management Plan and Forms C & D given to U.S. Attorney.

& True Copy
ATTEST:

SYLVESTER A. MARKOWSKI
Clerk, U. S. District Court

By: Ann M. Hess
Deputy Clerk

DIST/OFFICE	DOCKET YR. NUMBER	FILING DATE MO. DAY YEAR	J	N/S	O	R	DEMAND OTHER	JUDGE NUMBER	JURY DEAL	DOCKET
205/2	75 345	10 29 75	2	890	1	1		0505		75

PLAINTIFFS

WALTER, Claudia and Dominick Cortese,
individually and on behalf of all
other persons similarly situated

M. JOSEPH BURRIS JR.

DEFENDANTS

HILLS, Carla, individually and
her official capacity as Secretary
of the U.S. Dept. of Housing and
Urban Development;
CARABETTA ENTERPRISES, INC. a corporation
organized and existing under
the laws of the State of Connecticut
located in the Town of Meriden,
County of New Haven, State of Connecticut

Cor. 205/2
303
w/ 75-346
76-160

CAUSE

Seeks declaratory and injunctive relief to compel rescission the def. approval of
rent increases. Alleges they are denied right guaranteed them by the Fifth Amendment
USC and National Housing Act as amended by the Housing and Community Development
Act of 1974.

ATTORNEYS

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Guy DeFrances (Carabetta En
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☒ CHECK
HERE
IF CASE WAS

FILING FEES PAID

DATE

RECEIPT NUMBER

CD NUMBER

STAMPED

FILED

PROCEEDINGS

DATE	NR.	
0-29	1.	Complaint. Motion to proceed in forma pauperis, Blumenfeld, J. m 10 31 75 and motion for T.R. filed. Summons issued and together with same, and copies of complaint and attested copies of motion handed to UCM for service on both defs.
"	2.	Affidavits in support of motion to proceed in forma pauperis.
10-31	3.	TEMPORARY RESTRAINING ORDER, Blumenfeld, J. m 10 31 75, Copies handed to Atty Sturdevant (Pltf. Atty) copies mailed by certified mail to Atty Wilhelm and Atty DeFrances.
11-5	4.	Appearance of Marjorie Wilhelm entered for def. US Dept of HUD
"	5.	Motion for Preliminary Injunction filed by Pltf.
11/10	6.	Appearance of Guy R. DeFrances, Esq., entered for def. Carabetta Enterprises, Inc.
11/10	7.	Memorandum of Law in Support of Plaintiffs' Motion For Preliminary Injunction.
11/12	10.	HEARING on motion for preliminary injunction, Fed. Def. Brief in opposition to Pltf. motion for prel. injunction filed. Dec. R.S.
11/19	8.	Motion to Consolidate for Purposes of Trial (1175-346 & 1175-303)
11-18	9.	Marshal's returns showing service.
11/21	10.	Endorsed on #8 "motion granted, Blumenfeld, J. m 11/21/75. Copies mailed.
11/25	11.	Plaintiffs' Response to Federal Def. Motion to Consolidate.
12-2	12.	Supplemental Memorandum of Law in Support of Pltf. Motion for a Prel. Injunc
"	13.	Affidavit of Albert J. Kliman
12-15	14.	Affidavit of H. R. Crawford
1976	15.	Ruling on Plaintiffs Motion for Preliminary Injunction, Blumenfeld, J m 12-1
2-17	16.	Copies mailed to counsel. (injunction modified)
"	17.	Motion to Dissolve Preliminary Injunction
"	18.	Memorandum Brief in support of motion to dissolve preliminary injunction.
"	19.	Affidavit of Carla A. Hills
3-1	20.	Affidavit of Robert C. Odle Jr.
2-24	21.	Affidavit of Thomas J. O'Connor
3-2	22.	Motion for A Temporary Restraining Order and brief in support of motion fi
"	23.	by Plaintiff.
"	24.	Plaintiffs Motion to Amend Class Certification
"	25.	Plaintiffs Brief to Amend Class Certification
"	26.	Stipulation Re: reserve funds,
"	27.	ORDER TO SHOW CAUSE, Blumenfeld, J. m 3-2. (Hearing on 3/29/76 Copy mailed
"	28.	Atty Wilhelm by certified mail and mailed to counsel of record.
3-2	29.	Motion for Preliminary Injunction.
3-5	30.	Motion for Extension of Time filed by Pltf. (Re: one wk after trans. of de
3-9	31.	to respond to def. motion to dissolve pre. injunction)
3-15	32.	Notice of Deposition filed by Pltf. (R. Odle on 3/15/76)
"	33.	Notice of Deposition filed by Pltf. (C. Hills, on 3/15/76)
"	34.	Affidavit of Fred W. Pfaender.
"	35.	Certification of service of Stipulation & Order mailed to counsel.
"	36.	Marshal's return showing service on def. Hills by cert. mail
"	37.	(return in 1175-303 file).
"	38.	Notice of Filing unsigned copy of affidavit of C. Hills
"	39.	Motion to Quash Subpoena and for Protective Order filed by def. C. Hills.
"	40.	Federal Def. Memorandum Brief in Support of Motion to Quash and for
"	41.	Protective Order.
"	42.	Plaintiff's Memorandum Brief in Opposition to Federal Defenda
"	43.	Motion to Quash.
"	44.	Affidavit of Carla A. Hills.
"	45.	Notice filed by def. Re: postponement of deposition of Carla Hills.
"	46.	Memorandum Brief of Federal Def. in Opposition to Pltf. Motions for Prel
"	47.	Injunction and Amended Class Certification
"	48.	Affidavit of Fred W. Pfaender

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF		DEFENDANT	DOCKET # 175-34
Walter, Claudia, Et Al		Carla Mills, Et Al	PAGE 2 OF 2
DATE	NR.	PROCEEDINGS	
1976			
3-29-76	39	Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction.	
"	40	Motion for Leave to File Substitute Amended Complaint.	
"	41	Substitute Amended Complaint filed.	
"		HEARING on Pltf. motion for preliminary injunction and defts. motion to dismiss class action. Dec. Reserved on both motions Motion to file amended complaint granted. Sub. Amended Complaint filed, w/out objection.	
3-31	42	Certification of Motion for Leave to File Substitute Amended Complaint.	
4-15	43	Notice of Depositions filed by Pltfs. (4-26-76 & 4-27-76 at 1 Court Reporter's notes of Proceedings held on Nov. 12, 1975, in Hartford. (Collard, R.)	
4/20			
4-21	44	Stipulation re: monies currently held or to be deposited in "reserve fund".	
4-22		Judge's endorsement re: Motion to Consolidate for Purposes of Docket No. H-75-303, H-75-345 and H-75-346 with H-76-160 - "G Blumenfeld, J. m4-22-76. Copies to counsel. (Filed in H-76-160)	
4-23	45.	Motion to Withdraw Affidavit. of Robert C. Odle Jr.	
"	46.	Affidavit of Fred W. Pfeender.	
4-26		Court Reporter's notes of Proceedings held on March 29, 1976, filed in Hfd. (Collard, R.)	
"	47	ORDER, Blumenfeld, J. m 4-26-76. Re: sub. affidavit of F. Pfeender, Copies to counsel.	
5-18		Transcript of hearing held on 3/29/76. Collard, R.	
5-17	48	Plaintiffs' Motion for Production of Documents.	
5-17	49	Plaintiffs' Interrogatories to a Party Defendant.	
5-27	50	Ruling on Plaintiffs Motion To Amend Class Certification filed. Blumenfeld m 5-27-76. Copies to counsel (Pltf. class persons who reside or will in the future, Deft. class owners of projects and HUD to make payments -private de reimburse tenants)	
6-1	51	Motion to Consolidate for Purposes of Trial filed by Def. (N-76-109, H-75-346, H-75-345, H-75-303 and H-76-160)	
6-7	52	Memorandum of Law in Opposition to Fed. Deft. Motion to Dissolve Preliminary Injunction.	
6-4		Motion to Consolidate Granted. Blumenfeld, J m N.H.)	
6-21	53	Motion to Vacate Order and Dissolve Preliminary Injunction, or for a Stay Pending Appeal, or for an Extension of Time for Compliance filed by Defs.	
6-21	54	Memorandum in Support of Motion to Vacate Order and Dissolve Injunction, or for Stay Pending Appeal, or for Extension of Time for Compliance filed by defts.	
6-24	55	Notice of Affidavit of James Tahash.	
"	56.	Affidavit of James Tahash.	
6-28	57	Notice of Affidavit of Bernard M. Cameron.	
6-28	58	Affidavit of Bernard M. Cameron.	
6-28	59	Motion for Clarification of Ruling on Pltfs'. Motion for a Preliminary Injunction.	
6-28	60	Stipulation extending time for Compliance of Court's Order	

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF		DEFENDANT	DOCKET NO. <u>11-75-</u>
WALTER, Claudie, Et Al		HILLS, Carla, Et Al	PAGE <u>3</u> OF <u>3</u>
DATE	NR.	PROCEEDINGS	
<u>1976</u> 6-28	61	Order denying Government's motion to vacate the order of 5-27-7 and motion for a stay of orders pending appeal. Blumenfeld, J. 6-28-76. Copies mailed to counsel.	
6-28	62	Plaintiffs' Response to Federal Defendant's Motion to Vacate Order and Dissolve Injunction or for a Stay Pending Appeal or for an Extension of Time.	
6-30	63	Affidavit of John A. Dziamba.	
6-29	64	Stipulation, filed, re subsidy payment.	
6-29	65	Stipulation, filed, re monies in reserve fund.	
6-28		HEARING on motion to vacate, denied. Motion to Stay Pending Appeal, denied. Motion for extension of time to comply. Stipulation to until 7/31/76. Affidavit of James J. Tahash, filed.	
7-2	66	Memorandum of Law in Support of Pltfs.' Motion for Clarification of Ruling on Pltfs.' Motion for a Preliminary Injunction.	
7-8		Court Reporter's notes of Proceedings held on June 28, 1976, filed in Hfd. (Collard, R.)	
7-7	67	Notice of Appeal filed by def. Copies of notice mailed to counsel of record. Attested copy of notice and docket entries mailed to U.S. Court of Appeals and Haven. Civil Management Plan and Forms C & D mailed to US Atty.	

A True Copy
ATTEST:

SYLVESTER A. MARKOWSKI
Clerk, U. S. District Court

By: [Signature]
Deputy Clerk

DIST/OFFICE	DOCKET NO.	DOCKET NUMBER	FILING DATE MO. DAY YEAR	J	N/S	O	R	S	DEMAND OTHER	JUDGE NUMBER	JURY DEM.	FILE
205/2	75	346	10 29 75	2	890	1		1		0505		75

PLAINTIFFS

LITTLE, Janette, individually
and on behalf of all others similarly
situated

Conwell

W/75-345-
313

76-160

H. JOSEPH BROWNFIELD

DEFENDANTS

MILLS, Carla, individually and
her official capacity as Secy
of the U.S. Dept. of Housing
Urban Development; RICHARD E.
individually and in his cap
as part-owner of East Hartford
Estates; OAK MANAGEMENT CO.,
a Connecticut Corporation; L.
BROWN, individually and in h
capacity as part-owner of E
Hartford Estates;

CAUSE

Seeks declaratory and injunctive relief to compel rescission of the def.'s approval
rent increases. Alleges denied their rights under the National and Community Act of
by the def. failure to provide the 22. private defendant operating subsidy as req.
12 USC §1715 z-1(f)(3) and (g)

ag

ATTORNEYS

Joan Pilver tel. 566-6360
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Marjorie Wilhelm Asst. US A
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New Haven, Conn.

James H. Shulman (R. Brown, I
Ribicoff & Kotkin (& Oak M
799 Main St.
Hartford, CT 06103 527-07

H75-346

Battler vs Hills

H75-346

		PROCEEDINGS
1975	NR.	
10-29	1.	Complaint, and motion to proceed in forma pauperis filed. Blumenfeld, J. m
10-30	2.	Motion for preliminary injunction and application for T.R.O. filed. Summons issued and together with same and attested copy of motion handed to USM for serv on all 4 defs.
10-31	3.	Temporary Restraining Order, Blumenfeld, J. m 10 31-75. Copies handed to Sturdevant to deliver personally to Atty Pilver and Norko. Copies mailed by c ified mail to Atty Wilhelm and picked up in office by Atty Shulman.
"	4.	Appearance of James H. Shulman entered for def. Richard & Louis Brown and Management Co.
11-5	5.	Appearance of Marjorie Wilhelm entered for the def. US Dept of HUD
11-12		HEARING on motion for preliminary injunction. Fed. Def. Brief in oppos to Pltf. motion for preliminary injunction filed. Stipulation of Little and def. filed. Proposed Protective Order, (No attachments) Plaintiffs Brief in support motion for prel. injunction. One Pltf. witness sworn and testified.
11-19	6.	Motion to Consolidate for Purposes of Trial, (H75-345 & H75-303) filed by
11-18	7.	Marshal's return showing service.
11/21		Endorsed on #6 to consolidate, "motion granted, Blumenfeld, J m 11/21/Copie
12-2	8.	Affidavit of Albert J. Kliman
"	9.	Affidavit of R. E. Crawford
12-15	10.	Ruling on Plaintiffs Motion for Preliminary Injunction, Blumenfeld J m 12 Copies mailed to counsel. (injunction modified)
1976		
2-12	11.	Motion for Production of Documents filed by Pltf.
	12.	Interrogatories to a Party Defendant.
2-17	13.	Motion to Dissolve Preliminary Injunction filed by def.
"	14.	Memorandum Brief in support of motion to dissolve preliminary injunction
"	15.	Affidavit of Carla A. Hills
"	16.	Affidavit of Robert C. Odle Jr
"	17.	Affidavit of Thomas J. O'Connor
3-1	18.	Motion for a Temporary Restraining Order and brief in support of motion by plaintiff.
"	19.	Plaintiffs Motion to Amend Class Certification.
"	20.	Plaintiffs Memorandum to Amend Class Certification
3-2	21.	Stipulation Re: reserve funds.
"	22.	ORDER TO SHOW CAUSE, Blumenfeld, J. Copies mailed to counsel. (Hearing 3/29/76) m 3-2-76
"	23.	Motion for Preliminary Injunction
"	24.	Motion for Extension of Time filed by Pltf. (R: one wk after trans. of to respond to def. motion to dissolve pre. injunction)
"	25.	Notice of Deposition filed by Pltf. (R. Odle on 3/15/76)
"	26.	Notice of Deposition filed by Pltf. (C. Hills on 3/15/76)
3-2	27.	Affidavit of Fred W. Pfaender.
3-5	28.	Certification of service of Stipulation and Order to counsel.
3-9		Marshal's return showing service on def. Hills by cert. mail (re in H75-303 file).
3-15	29.	Notice of Filin unsigned copy of affidavit of Carla Hills.
"	30.	Motion to Quash Subpoena and for Protective Order filed by def. C. Hills
"	31.	Federal Def. Memorandum Brief in Support of Motion to Quash and for Prote Order.
3-25	32.	Plaintiffs Memorandum Brief in Opposition to Federal Defendant's Motion to Quash

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF		DEFENDANT	DOCKET NO. <u>H75-</u>
LITTLE, Janette, Et Al		HILLS, Carla, Et Al	PAGE <u>2</u> OF <u>2</u>
DATE	NR.	PROCEEDINGS	
1976 3-29	37	Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction.	
"		HEARING on Pltf. motion for preliminary injunction and defts. motion to d class action. Dec. Reserved on both motions. Motion to file amended complaint granted. Sub. Amended complaint filed w/out objection.	
4-15 4/20	38	Notice of Depositions filed by Pltfs. (4-26-76 & 4-27-76 at 10 Court Reporter's notes of Proceedings held on Nov. 12, 1975, in Hartford. (Collard, R.) held	
4-21	39	Stipulation re: monies currently/or to be deposited in "reserve fund."	
4-22		Judge's endorsement re: Motion to Consolidate for Purposes of Docket Nos. H-75-303, H-75-345 and H-75-346 with H-76-160 - "G. Blumenfeld, J. m4-22-76. Copies to counsel. (Filed in H-76-160	
4-23	40	Motion to Withdraw Affidavit of Robert C. Odle Jr.	
"	41.	Affidavit of Fred W. Pfaender.	
4-26		Court Reporter's notes of Proceedings held on March 29, 1976 filed in Hfd. (Collard, R.)	
"	42	ORDER, Blumenfeld J. m 4-26-76. Re: Sub. of affidavit of F. Pfaender. Co to counsel.	
5-18		Transcript of hearing held on 3/29/76	
5-27	43	Ruling on Plaintiffs Motion to Amend Class Certification filed. Blumenfeld m 5/27/76. Copies to counsel. (Pltf. class persons who reside or will in the Def. class owners of projects and HUD to make payments private debt to re: tenants)	
6-1	44	Motion to Consolidate for Purposes of Trial filed by Def. (N-76-109, H-75-346, H-75-345, H-75-303, H-76-160)	
6-4		Motion to Consolidate GRANTED. Blumenfeld, J. Copies to counsel. m N, H	
6-7	45	Memorandum of Law in Opposition to Fed. Def. Motion to Dissolve Preliminary Injunction	
6-16	46	ANSWER OF THE Def. Louis Brown aka East Hartford Estates to Pltf. Inter	
"	47	Response to Pltf. Motion for Production of Documents. filed by def. Louis	
6-21	48	Motion to Vacate Order and Dissolve Preliminary Injunction, or a Stay Pending Appeal, or for an Extension of Time for Compliance filed by Defs.	
6-21	49	Memorandum in Support of Motion to Vacate Order and Dissolve Injunction, or for Stay Pending Appeal, or for Extension of Time for Compliance filed by Defs.	
6-24	50	Notice of Affidavit of James Tahash.	
"	51	Affidavit of James Tahash.	
6-28	52	Notice of Affidavit filed by Fed. Defs. of Bernard M. Cameron	
6-28	53	Affidavit of Bernard M. Cameron.	
6-28	54	Motion for Clarification of Ruling on Pltfs'. Motion for a Preliminary Injunction.	
6-28	55	Stipulation extending time for Compliance of Court's Order	

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CIVIL DOCKET - CONTINUATION SHEET

PLAINTIFF		DEFENDANT	DOCKET NO. <u>11-75-</u>
LITTLE, Janette, Et Al		HILLS, Corla, Et Al	PAGE <u>3</u> OF <u>3</u>
DATE	NR.	PROCEEDINGS	
<u>1976</u> 6-28	56	Order denying Government's motion to vacate the order of 5-27-7 and motion for a stay of orders pending appeal. Blumenfeld, J. m6-28-76. Copies mailed to counsel.	
6-28	57	Plaintiffs' Response to Federal Defendant's Motion to Vacate Or and Dissolve Injunction or for a Stay Pending Appeal or for an Extension of Time.	
6-29	58	Stipulation, filed re reserve fund	
6-30	59	Affidavit of John A. Dziamba.	
6-29	60	Stipulation, filed re subsidy payments.	
6-28		HEARING on motion to vacate, denied, motion to stay pending appeal, denied motion for extension of time to comply, Stipulation extending time until 7	
7-2	61	Memorandum of Law in Support of Pltfs' Motion for Clarification of Ruling on Pltfs' Motion for a Preliminary Injunction.	
7-8		Court Reporter's notes of Proceedings held on June 28, 1976, filed in Hfd. (Collard, R.)	
7-7	62	Notice of Appeal filed by def. Copies of notice and and docket entries sent U.S. Court of Appeals and New Haven. Civil Management Plan and Forms C & D to U.S. Atty.	

A True Copy
ATTEST:

SYLVESTER A. MARKOWSKI
Clerk, U. S. District Court

By: R. M. Hill
Deputy Clerk

DUBOSE v. HILLS

Cite as 403 F.Supp. 1277 (1975)

1277

intention to appeal an adverse decision. The State should not be required to adopt unisex tables until and unless a decision is upheld on appeal.

The State contends that adopting unisex tables will threaten the financial soundness of the retirement fund. On limited facts before the court, I do not think the fund is threatened.⁷

The plaintiffs also seek counsel fees. Rule VII permits the court in its discretion to award counsel fees. Counsel fees are ordinarily given to a prevailing party. *Robinson v. Lorillard Corp.*, 323 F.2d 791, 804 (4th Cir. 1971), cert. denied, 404 U.S. 1005, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971), 1007 (1972). If the plaintiffs prevail on appeal, they will be awarded counsel fees in an amount to be determined later.

The State contends that it cannot assess counsel fees because of the Eleventh Amendment. In my view a proper source of counsel fees is the refund annuity benefit fund, none of which contains State funds and which was contributed by the employees. *Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973).

This opinion shall constitute findings of fact and conclusions of law under Fed. Civ.P. 52(a).

Counsel for plaintiffs shall prepare an appropriate judgment.

Vernice DUBOSE et al.
v.

Carla HILLS et al.

Claudia WALTER et al.
v.

Carla HILLS et al.

Janette LITTLE et al.
v.

Carla HILLS et al.

Civ. Nos. H-75-303, H-75-345,
H-75-346.

United States District Court,
D. Connecticut.
Dec. 15, 1975.

Low-income residents of federally subsidized housing project sought declaratory and injunctive relief, compelling rescission of a rent increase and implementation of the "operating subsidy" program established in the Housing and Community Development Act of 1974. On the low-income resident's motion for preliminary injunction, the District Court, Blumenfeld, J., held that the Secretary of Housing and Urban Development was required to implement the "operating subsidy" program; and that the Secretary's refusal to implement the program constituted an unreasonable exercise of discretion, even if she would be required to use her contract authority to do so.

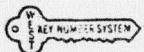
Preliminary injunction issued.

1. Courts (289(2))

National Housing Act, having been enacted pursuant to Congress' commerce power, may be construed under commerce jurisdiction. National Housing Act, § 1 et seq. as amended 12 U.S.C.A. § 1701 et seq.; 28 U.S.C.A. § 1337.

disparity between monthly payments to men and women is about 10 per cent. If retirement benefits to women were raised to

the level of men's benefits, and if half the current recipients are women, the total refund annuity outlay would increase only 5 per cent.



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2. Courts — 265

Where low-income residents of federally subsidized housing project sought order compelling hearing on agency-approved rent increases and sought to compel Secretary of Housing and Urban Development to pay certain rent subsidies authorized by statute, court had mandamus jurisdiction. 28 U.S.C.A. § 1361.

3. United States — 53(9)

Secretary of Housing and Urban Development was required to implement "operating subsidy" program, established by Housing and Community Development Act of 1974, which aided low-income residents of federally subsidized housing projects in paying sharply increased operating costs, since in enacting that program, Congress set up an automatic funding arrangement. National Housing Act, §§ 236, 236(f), (f)(3), (g) as amended 12 U.S.C.A. §§ 1715z-1, 1715z-1(f), (f)(3), (g).

4. United States — 53(9)

Secretary of Housing and Urban Development has discretion over how to allocate her contract authority among various federal programs providing assistance to housing.

5. United States — 53(9)

Secretary of Housing and Urban Development's refusal to implement "operating subsidy" program established by Housing and Community Development Act of 1974 to aid low-income residents of federally subsidized housing projects in paying sharply increased operating costs was unreasonable exercise of her discretion, even if she would be required to use her contract authority to implement the program. National Housing Act, §§ 236, 236(f), (f)(3), (g) as amended 12 U.S.C.A. §§ 1715z-1, 1715z-1(f), (f)(3), (g).

6. Injunction — 147

To warrant issuance of preliminary injunctive relief, party seeking injunction must combine clear showing of probable success on merits with possibility of irreparable injury, or else raise

substantial questions involving merits, while demonstrating that balance of hardships tips sharply in his or her favor.

7. Injunction — 136(2), 137(4)

Secretary of Housing and Urban Development would be preliminarily enjoined to implement "operating subsidy" program established by Housing and Community Development Act of 1974 to assist low-income residents of federally subsidized housing projects in paying sharply increased operating costs, in light of fact that low-income residents suing Secretary to implement said program would probably succeed on merits and fact that rent increases imposed on low-income residents were primarily result of operating costs increases. National Housing Act, §§ 236, 236(f), (f)(3), (g) as amended 12 U.S.C.A. §§ 1715z-1, 1715z-1(f), (f)(3), (g).

Dennis J. O'Brien, Norman K. Janes, Willimantic, Conn., for Dubose and others.

John A. Dziamba, Willimantic, Conn., James C. Sturdevant, Rockville, Conn., for Walter and others.

Joan Pilver, Hartford, Conn., Raymond Norko, Danielson, Conn., for Little and others.

Peter Dorsey, U. S. Atty., Marjorie A. Wilhelm, Asst. U. S. Atty., New Haven, Conn., Paul Michael, Civ. Div., Dept. of Justice, Washington, D. C., Rolland J. Castleman, Manchester, Conn., Guy DeFrances, Meriden, Conn., James H. Shulman, Hartford, Conn., for Hills and others.

RULING OF PLAINTIFFS' MOTION FOR PRELIMINARY IN- JUNCTION

BLUMENFELD, District Judge.

The plaintiffs in this action are low-income residents of a federally subsidized housing project, Windham Heights Apartments, in Windham, Connecticut.

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They complain that the federal¹ and private² defendants have denied them, and others similarly situated, rights protected by the fifth amendment, as well as rights created by the National Housing Act³ as it was amended by the Housing and Community Development Act of 1974,⁴ and regulations issued pursuant to that Act.⁵ They seek declaratory and injunctive relief, compelling rescission of a rent increase⁶ and implementation of a presently dormant federal subsidy program.⁷ Two similar suits were filed subsequent to the initiation of this action.⁸ Temporary restraining orders have been issued in all three cases requiring that HUD pay a portion of the rent increases.⁹ These motions for preliminary injunctive relief have been consolidated by agreement of the parties at the suggestion of the court. For purposes

of these motions, the plaintiffs have decided not to proceed with their due process claims.¹⁰

I.

[1, 2] Jurisdiction is conferred by 28 U.S.C. § 1337. Several courts have held that the National Housing Act, having been enacted pursuant to Congress' commerce power, may be construed under the commerce jurisdiction.¹¹ I adopt their reasoning. Mandamus jurisdiction is also present, under 28 U.S.C. § 1361. Here, just as in *Langevin v. Chenango Court, Inc.*,¹² the plaintiffs seek an order compelling a hearing on the agency-approved rent increases. Moreover, the plaintiffs seek to compel the Secretary to perform a duty she allegedly owes them—the payment of the subsidies authorized by the 1974 amendments to Section 236.¹³ Since jurisdiction is proper

1. The Secretary of Housing and Urban Development, Carla Hills, is sued individually and in her official capacity.

2. The owner of the housing project, Windham Heights Associates, is a limited partnership. The managing agent, Anthony Associates, is a general partnership. Simon Kouover is a general partner in both partnerships. All three are named defendants.

3. 12 U.S.C. § 1701 *et seq.* (1970).

4. Pub.L. 93-383, 88 Stat. 633 (1974).

5. 24 C.F.R. §§ 236.1 *et seq.*; §§ 401.1 *et seq.*; and §§ 425.1 *et seq.*

6. The Department of Housing and Urban Development (HUD) approved a \$20 per unit rent increase during the summer of 1975, to take effect October 1, 1975.

7. The Housing and Community Development Act of 1974, Pub.L. 93-383, 88 Stat. 633, added a new subsidy program to Section 236, providing for the payment of operating subsidies to certain housing projects assisted under Section 236. 12 U.S.C. § 1715z-1. (Supp. IV, 1974). Section 212 of the Act contained the new program, which now may be found at 12 U.S.C. §§ 1715z-1(f)(3) and (z). (Supp. IV, 1974).

8. *Walter v. Hills*, Civil No. H-75-345 and *Little v. Hills*, Civil No. H-75-346. These cases involve different housing projects, with different plaintiffs private defendants. Although some of the issues are also different, the primary claim in each of these cases is the same as the federal statutory claim at issue here.

9. HUD is paying, as required, "that portion of the approved rent increase which is directly attributable to an increase in taxes and utilities paid by the private defendant" in all three cases. These payments are "for the account of those tenants who are currently spending more than 30% of their adjusted family income towards rent."

10. They have reserved their right to challenge the rent increases at the trial on the merits. But see *Harlib v. Lynn*, 511 F.2d 51 (7th Cir. 1975); *Langevin v. Chenango Court Inc.*, 447 F.2d 236 (2d Cir. 1971); and *Hahn v. Gottlieb*, 430 F.2d 1243 (1st Cir. 1970).

11. *Davis v. Romney*, 490 F.2d 1360, 1365-66 (3d Cir. 1974); *Blountworth v. Oxford Village Townhouses, Inc.*, 377 F.Supp. 700, 714-15 (N.D.Ga.1974). *Mandina v. Lynn*, 357 F.Supp. 280, 276 (W.D.Mo.1973). Cf. *Wilmington v. United States Department of Housing & Urban Development*, 512 F.2d 617, 621-23 (5th Cir. 1975). But cf. the perfunctory rejection of a similar claim that the United States Housing Act of 1937, 42 U.S.C. § 1401 *et seq.*, could be construed under the commerce jurisdiction in *Potrero Hill Community Action Committee v. Housing Authority of the City and County of San Francisco*, 410 F.2d 974, 978-79 (9th Cir. 1969).

12. 447 F.2d 290, 300 (2d Cir. 1971).

13. See *Kahane v. Carlson*, 527 F.2d 492 (2d Cir. 1975) (Friendly, J. concurring) for a brief discussion of the nature of mandamus jurisdiction, and its relationship to the general federal question jurisdiction in suits against

federal officers. *Winningham v. United States Department of Housing & Urban Development*, 512 F.2d 617, 620-21 (5th Cir. 1975) is not contrary. There the plaintiff sought mandamus to compel the defendants to "ignore their statutory mandate" in favor of her asserted constitutional right. Here, by contrast, the plaintiffs merely seek to enforce an alleged statutory duty, under Section 236.

15. The plaintiffs in *Little* also challenge the method by which HUD has calculated the operating subsidy, alleging that more residents of East Hartford Estates should be covered and that higher payments should be made. They base this claim on the special provisions for separate metering of utilities in (f) (1) (i) and (ii), and (f) (3) of Section 236. Because this claim has not been briefed or argued by either party, I do not decide it today. The plaintiffs may, of course, raise it at the hearing on the merits.

17. Section 212 of the Act recast and amended, among other provisions, subsections (f) and (g) of Section 236. The "operating subsidy"

II.

program at issue here is contained in subsections (f)(3) and (z), and provides that:

"(3) For each project there shall be established an initial operating expense level, which shall be the sum of the cost of utilities and local property taxes payable by the project owner at the time the Secretary determines the property to be fully occupied, taking into account anticipated and customary vacancy rates. At any time subsequent to the establishment of an initial operating expense level, the Secretary is authorized to make, and contract to make, additional assistance payments to the project owner in an amount up to the amount by which the sum of the cost of utilities and local property taxes exceeds the initial operating expense level, but not to exceed the amount required to maintain the basic rentals of any units at levels not in excess of 30 per centum, or such lower per centum not less than 25 per centum as shall reflect the reduction permitted in clause (ii) of the last sentence of paragraph (1), of the income of tenants occupying such units. Any contract to make additional assistance payments may be amended periodically to provide for appropriate adjustments in the amount of the assistance payments. Additional assistance payments shall be made pursuant to this paragraph only if the Secretary finds that the increase in the cost of utilities or local property taxes, is reasonable and is comparable to cost increases affecting other rental projects in the community.

However, no assistance has been made under this

"(g) The project by the Secretary, periodically pay to charges collected in rental charges. Such be credited to a reserve. The Secretary to make payments as provided in subsection (f) of the period that the Secretary the balance in the reserve to meet the estimated payments, such as credited to the appropriate subsection (i) of the available until the end of the year for the purpose of payments with respect to projects receiving assistance. For the purpose of paragraph (3) of section, the initial for any project as entered into prior to be established by more than 180 days after

18. "The Committee problem experience rise above those in the present program, adjusting the subsidies with the result that lower income tenants are required to pay far more for their incomes for the anxious to deal with the Committee also develop a provision the real problem can be administered and poor management.

Accordingly, the
each project there
initial operating ex-

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Community Development Act of that year. This program was adopted in response to problems in the administration of Section 236, due in large measure to the sharp increases in operating costs which had taken place at many Section 236 projects. The relevant portion of the Senate Report accompanying its version of the Act is also set forth in the margin.¹⁸ The clear import of the program, as outlined in the Committee Report, was to insulate the low-income tenants from the burden of operating cost increases.

However, no assistance payments have been made under this program. Instead,

"(g) The project owner shall, as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be credited to a reserve fund to be used by the Secretary to make additional assistance payments as provided in paragraph (3) of subsection (f) of this section. During any period that the Secretary determines that the balance in the reserve fund is adequate to meet the estimated additional assistance payments, such excess charges shall be credited to the appropriation authorized by subsection (i) of this section and shall be available until the end of the next fiscal year for the purpose of making assistance payments with respect to rental housing projects receiving assistance under this section. For the purpose of this subsection and paragraph (3) of subsection (f) of this section, the initial operating expense level for any project assisted under a contract entered into prior to August 22, 1974, shall be established by the Secretary not later than 180 days after August 22, 1974."

18. "The Committee was concerned with the problem experienced by projects where costs rise above those initially projected. Under the present program, there is no way of adjusting the subsidy to meet such costs, with the result that the burden falls upon lower income tenants, who may thus be required to pay far more than 25 percent of their incomes for their apartments. While anxious to deal with this problem, however, the Committee also of course desired to develop a provision which would focus upon the real problem cases and could be tightly administered and would not simply reward poor management.

"Accordingly, the bill provides that for each project there would be established an initial operating expense level equal to the

the Secretary of Housing and Urban Development, claiming that she possesses "full discretion to determine whether the program should be implemented," has decided not to fund or implement the program in any way.¹⁹ The plaintiffs contend that this decision contravenes the mandate of Congress, and constitutes an unlawful "impoundment" of funds by the Secretary.²⁰ They argue, first, that she possesses no such "absolute" discretion regarding the implementation of the "operating subsidy" program and, second, that she has abused whatever discretion she may possess.

sum of the cost of utilities, maintenance,* and local property taxes, taking into account anticipated and customary vacancy rates. On the basis of this initial level, the Secretary would be authorized to provide additional assistance payments in problem cases where needed to offset increases in the costs covered. These additional payments could not exceed the lesser of (A), the amount by which the sum of the cost of utilities, maintenance, and local property taxes exceeds the initial operating expense level, or (B) the amount required to insure that the basic rent of any unit does not exceed 30 percent of the income of the tenant occupying such unit. Additional operating assistance payments could only be made where the increase in the cost item involved is reasonable and comparable to cost increases affecting other rental projects in the community."

S.Rep. No. 693, 93d Cong., 2d Sess. (1974), reported at 3 U.S.Code Cong. & Admin.News, pp. 4303-04 (1974).

- * The provision for subsidizing increases attributable to maintenance was deleted from the bill before its enactment into law.

19. The Secretary has the authority, under subsection (h) of Section 236, "to make such rules and regulations, to enter into such agreements, and to adopt such procedures as are deemed necessary or desirable to implement the Section 236 program." None of this authority has been exercised with respect to the operating subsidy provisions.

20. Neither they nor the Secretary contend that the provisions of the Congressional Budget and Impoundment Control Act of 1974, Pub.L. 93-344, 88 Stat. 297, 31 U.S.C. § 1401 et seq. (Supp. IV, 1974) apply to this case. The President has not included the moneys in the reserve fund established by subsection (g) among the deferrals of budget

The issues in this case are quite similar to those addressed by the Court of Appeals for the District of Columbia Circuit in *Commonwealth of Pennsylvania v. Lynn*.²¹ Here, as there, the Secretary's claim of discretion not to implement the Section 236 program does not rest on a claim of executive power not to spend appropriated funds or use released contract authority for fiscal or other policy reasons "totally collateral" to the purpose of the Section 236 housing program.²² Rather, the Secretary has refused to act on the basis of policy decisions she claims will better effectuate the underlying goals of the National Housing Act and, indeed, Section 236 itself. In *Lynn* the court held that the Secretary possessed a narrow discretion to terminate or suspend the entire Section 236 program,²³ and that the temporary suspension there at issue constituted a reasonable exercise of that discretion.²⁴ Here the question concerns the Secretary's decision not to implement certain newly enacted subsidy provisions of that same Section 236 pro-

gram. At issue is the extent of her discretion, and the propriety of its exercise.

III.

[3] I turn first to the question of whether the Secretary possessed any discretion not to implement the "operating subsidy" program. The answer must be found by probing the intent of Congress in enacting the program.²⁵ The Secretary cites the language of the Act, its legislative history, and the subsequent funding actions of the Congress in support of her claim that the Congress never intended to compel her to implement this program. Her initial argument is that all three of these are couched in precatory rather than mandatory language; from this she concludes that the "operating subsidy" program was but one of several options open to her for use in implementing the overall objectives of the National Housing Act. Her second argument, based exclusively on the provisions for funding the program, is that she possesses discretion concern-

ing how to allocate the money Congress has made available for the various federal programs for which that authority is provided, and hence is empowered to expend that authority as she sees fit.

A. The Language

The Secretary bears the burden of proving that the precatory language in two sections of the Act, (f)(2) and (3), established the "discretion" and provides that the Secretary "may" make, and contract assistance payments under the program has been established by (f)(3). The program at issue is established by (f)(3), "the Secretary is authorized to make, and contract to make, assistance payments under the program." The Secretary claims that the use of "author" tends to compel her to make the contract to make" the program by that subsection.

authority required to be reported to Congress by that Act. Nor has the Comptroller-General. The Congressional debates are unclear as to whether the Secretary's contract authority which was released prior to the passage of the Impoundment Control Act is governed by its provisions. The Senate sponsor, Senator Sparkman, stated his belief that the funds already impounded would be subject to that Act, in response to a question from Senator Humphrey, 120 Cong. Rec. 814,806 (daily ed. Aug. 13, 1974). In the House of Representatives, however, Representative Brown of Michigan indicated that it was his understanding that that Act would not apply to previously appropriated funds, 120 Cong. Rec. H8423 (daily ed. Aug. 15, 1974). The Senate version of the Housing and Community Development Act had contained a provision, Section 821, purporting to require the President and the Secretary to fully fund the programs under the Act. This provision was deleted from the Housing and Community Development Act prior to its adoption, perhaps because of the intervening passage of the Impoundment Control Act. The Impoundment Control Act was adopted with a disclaimer provision, Section 1001 of Pub.L. 93-344. That clause stated that:

"Nothing contained in this Act shall be construed as . . . (4) superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder."

Because I construe § 1715a-1(g) as requiring the Secretary to spend the moneys in the reserve fund, see Part III B, *infra*, at 1284-1288, this disclaimer clause indicates that the Impoundment Control Act is inapplicable here.

21. 163 U.S.App.D.C. 288, 501 F.2d 848 (1974). Two district courts have decided practically identical cases and reached the same result as do I. *Harrison v. Hills*, Civil No. 75-938 (W.D.Pa. Oct. 1, 1975); *Ross v. Community Services, Inc.*, 396 F.Supp. 278 (D.Md.1975).

22. See *Commonwealth of Pennsylvania v. Lynn*, 163 U.S.App.D.C. 288, 501 F.2d 848, 852 (1974) and cases cited therein.

23. 501 F.2d at 861.

24. 501 F.2d at 865, 867.

25. 501 F.2d at 852, citing *Minor v. Mechanics' Bank*, 26 U.S. (1 Pet.) 46, 64, 7 L.Ed. 47 (1828).

26. Brief of Defendant.

27. Section 212 of Pub.L. 93-344 (1974).

28. S.Rep. No. 693, 93.

29. S.Rep. No. 1255, (1974).

30. Pub.L. 93-344, 88.

31. See, e.g., *Udall*, 16, 55 S.Ct. 792, 13.

32. The Secretary's position is interpreted virtually 42 U.S.C. § 1457a as section directs that: "the Secretary shall . . . costs of operation . . . of income, . . . character and local characteristics of the costs of providing . . . determined in accord-

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ing how to allocate the contract authority Congress has released to her among the various federal housing programs for which that authority may be used, and hence is empowered to choose not to expend that authority on any particular program.

A. The Language

The Secretary begins her mandatory/precatory distinction by contrasting the language in two subsections of Section 236, (f)(2) and (3). The first of these established the "deep subsidy" program, and provides that "the Secretary shall make, and contract to make, additional assistance payments" This program has been implemented by the Secretary.²⁶ The "operating subsidy" program at issue in this case was established by (f)(3), which provides that "the Secretary is authorized to make, and contract to make, additional assistance payments" Both subsidies were added by the 1974 amendments to Section 236.²⁷ Focusing upon the use of "authorized" in (f)(3), the Secretary claims that Congress never intended to *compel* her to "make, and contract to make" the payments permitted by that subsection.

She makes essentially the same argument based on the legislative history of the Housing and Community Development Act of 1974, emphasizing the phrases "would be authorized" and "may be used" in the Report of the Senate Banking, Housing, and Urban Affairs Committee.²⁸ Her claim is also based on the language of the Senate Appropriations Committee's Report²⁹ accompanying the Supplemental Appropriations Act³⁰ which specifically "authorizes" the Secretary to use her available contract authority to implement the "operating subsidy" program.

The Secretary's emphasis on "may" and "authorized" is misplaced. Despite the deference properly due to the interpretation given the statute by the agency charged with its enforcement,³¹ I conclude that the overall thrust of this statute is not optional. In addition to those passages relied upon by the Secretary, subsection (f)(3) directs that "[f]or each project there shall be established an initial operating expense level" when the project is fully occupied. Furthermore, subsection (g) requires the establishment of that level, for Section 236 projects already under contract, "not later than 180 days after August 22, 1974," the date of enactment of the Act.³²

26. Brief of Defendant Carla Hills at 10.

27. Section 212 of Pub.L. 93-383, 88 Stat. 633 (1974).

28. S.Rep. No. 693, 93d Cong., 2d Sess. (1974).

29. S.Rep. No. 1255, 93d Cong., 2d Sess. S (1974).

30. Pub.L. 93-554, 88 Stat. 1771 (1974).

31. See, e. g., *Tull v. Tullman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965).

32. The Secretary's predecessor apparently interpreted the virtually identical language of 42 U.S.C. § 1437g as being mandatory. That section directs that:

"the Secretary shall establish standards for costs of operation and reasonable projections of income, taking into account the character and location of the project and characteristics of the families served, or the costs of providing comparable services as determined in accordance with criteria or a

formula representing the operations of a prototype well-managed project."

These operating cost levels are to be established so that the Secretary:

"may make annual contributions to public housing agencies for the operation of low-income housing projects."

These provisions were enacted as the new "Section 9" program, by Section 201(a) of the same Housing and Community Development Act of 1974 which established the Section 236 "operating subsidy" program at issue in this case.

The language establishing these two programs is quite similar, both authorizing the Secretary to pay operating cost subsidies to projects serving low-income tenants and mandating the setting of operating cost levels. However, HUD has treated the two programs quite differently, acting rapidly to implement the Section 9 program while leaving the Section 236 program dormant. An Interim Rule was published in the Federal Register of April 16, 1975, implementing the Section 9 program

Subsection (g) also directs that the project owner "shall" pay excess rentals to the Secretary, which "shall" be credited to a reserve fund, for use in implementing the "operating subsidy" program established by (f)(3). Such excess rental charges "shall" be treated as appropriated funds, available to make these additional assistance payments, during any period that the Secretary has determined them sufficient to implement the program.

Of course, "tallying the 'shalls' and 'mays'" does not always provide insight into Congress' collective state of mind.³³ This is particularly true where, as here, the statute is a mixture of mandatory and precatory clauses. The Secretary asserts that she is not even required to make a determination of the initial operating expense levels, despite the statute's apparently mandatory language and explicit compliance deadline. The Secretary is wrong about that. The mandatory language of this clause, the inclusion of the compliance deadline for existing projects, and the adoption of the program in response to a specific need, convince me that Congress intended that the Secretary implement this program, and do so quickly. I interpret the "authorization" language as indicating only that the Secretary need not make, or contract to make, these additional assistance payments in any set amounts, or for every single Section 236

project.³⁴ Congress was concerned about this problem, but wanted to handle it without rewarding those projects where poor management was responsible for the cost increases.³⁵ Accordingly, it adopted a program which permitted the Secretary to assist deserving projects only: hence the use of "authorized" rather than "shall" in the statute. Under this reading of Section 1715z-1, the Secretary was mandated to establish "an initial operating expense level" for the three projects involved in this suit. The temporary restraining orders issued in these cases directed that she do so immediately, and those levels have now been established.³⁶

B. The Funding Arrangements

The Secretary also contends that, even if she must take the first steps toward implementing the "operating subsidy" program, the funding actions of Congress demonstrate that she has discretion over whether or not to fund the program. Of course, this is simply another way of claiming that she has complete discretion concerning whether to implement the program at all. Her argument rests upon the general nature of her spending authority under the federal housing programs, the specific provisions of this statute, and the actions of the Congress subsequent to the passage of the Housing and Community Development Act of 1974.

for operating cost subsidies to public housing agencies retroactively to April 1, 1975. 24 C.F.R. §§ 800.101 *et seq.*, 40 Fed. Reg. 17008-15 (1975). Yet nothing has been done to implement the Section 236 program for similar subsidies to housing projects assisted under Section 236 except pursuant to court orders. And this inaction has occurred despite Congress' setting an explicit compliance deadline of 180 days for the Section 236 program, while permitting 18 months for the implementation of the Section 9 program. Compare Section 201(b) of Pub.L. 93-383 with subsection (g) of Section 236, establishing the effective date of the Act.

33. *Commonwealth of Pennsylvania v. Lynn*, 163 U.S.App.D.C. 288, 501 F.2d 818, 854 (1974).

34. The "Joint Explanatory Statement of the Committee of Conference" on Pub.L. 93-383, Conf.Rep. No. 1279, 93d Cong., 2d Sess. (1974), states that:

"The conferees wish to point out that the specific amount of such increased subsidies should be determined by the Secretary taking into account the need to encourage reasonable economies in the operation of projects."

35. See S.Rep. No. 693, quoted at note 18 *supra*.

36. HUD determined these levels, and has been paying the subsidy calculated on that basis on behalf of tenants at all three projects, as set forth in note 9 *supra*. As discussed in note 15 *supra*, the plaintiffs in *Little* challenge the calculations used.

The federal is funded through congressional action must authorize funds for a project subsection (i) of provides:

"There are authorized such sums as may be necessary to carry out the provisions of this Act."

Subsection (i) of "The aggregate of contracts to be made shall not exceed the appropriation available to such project."

This demonstrates normal funding procedure release contract a tary, and it must to make payments These latter two Appropriations Act tinct from the au Secretary notes released any new use in implementing "operating subsidy" program, n funds specifically Thus, she claims, the program must contract authority for use in the funds over which broad discretion.

Her argument she contends that

37. 12 U.S.C. § 171

38. Pub.L. 93-554.

39. S.Rep. No. 127 (1974).

40. *Id.*

41. The interest rate guarantee known as the "Section 236" program was enacted and the Secretary's program with it issue in this case, encourage the Secretary to

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The federal housing programs are funded through a combination of Congressional actions. First, Congress must authorize the appropriation of funds for a program; this is done by subsection (i) of Section 236,³⁷ which provides:

"There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section"

Subsection (i) further provides that:

"The aggregate amount of outstanding contracts to make such payments shall not exceed amounts approved in appropriation Acts, and payments pursuant to such contracts shall not exceed"

This demonstrates the other steps in the normal funding process: Congress must release contract authority to the Secretary, and it must also appropriate funds to make payments under these contracts. These latter two steps must be done in Appropriations Acts, separate and distinct from the authorizing statute. The Secretary notes that Congress has not released any new contract authority for use in implementing the "operating subsidy" program, nor has it appropriated funds specifically for that purpose. Thus, she claims, the implementation of the program must come out of funds and contract authority generally available for use in the Section 236 program, funds over which she claims to have broad discretionary power.

Her argument runs as follows. First, she contends that the original Act does

37. 12 U.S.C. § 1715z-1(i) (Supp. IV, 1974).

38. Pub.L. 93-554, 88 Stat. 1771 (1974).

39. S.Rep. No. 1255, 93d Cong., 2d Sess. 8 (1974).

40. *Id.*

41. The interest reduction payment and mortgage guarantee programs are commonly known as the "production subsidy," since they were enacted to encourage the construction and rehabilitation of low income housing. The Secretary contrasts the impact of these programs with the "operating subsidy" at issue in this case, which she claims will not encourage the bringing of new units into the

not compel her to spend the moneys in the reserve fund, since the Legislative history merely provides that they "may be used" to make these additional assistance payments. Second, she argues that she has no power to expend these moneys except pursuant to contract, because payments are to be made as provided in (f)(3). Thus, she cannot implement the program unless she has contract authority available. Since no new contract authority has been released, she has to use contract authority which she had prior to the establishment of the "operating subsidy" program. She admits that the legislative history to the Supplemental Appropriations Act³⁸ clarified Congress' intent with respect to funding the "operating subsidy" program, specifically authorizing the Secretary to use her "available contract authority for operating subsidies for existing or new 236 projects."³⁹ However, she again raises the mandatory/precatory argument, since the committee report merely "authorizes" her to so use that authority. Furthermore, she contends that this language must be considered in conjunction with the Congress' explicit direction in that same report that the Secretary "utilize available resources for the Section 236 program at the earliest date to meet the need for lower income housing."⁴⁰ This second directive, she asserts, meant that she was to use her available contract authority to increase housing production,⁴¹ and that, when read together, these two directives give her discretion over how to allocate her contract authority among a number of

market. Although I need not resolve the conflict she asserts exists between these two instructions, see *infra* at 1288, I note that the Senate appeared to believe the "operating subsidy" to be relevant to housing production when it urged the Secretary to consider her authority to pay it in her evaluations of proposed Section 236 projects. S.Rep. No. 1255, 93d Cong., 2d Sess. 8 (1974). I also note that the "operating subsidy" program may help "meet the need for lower income housing" to which the Senate and the Secretary referred, by keeping Section 236 projects out of default and by keeping their basic rentals down for their low income tenants.

federal housing subsidy programs in order to best respond to the need for lower income housing.

There are two responses to this argument. The first involves the relationship between the reserve fund and the exercise of contract authority. The second involves the scope and exercise of the Secretary's discretion with respect to the use of her admittedly available contract authority. Only the first is properly considered at this time, since it involves the mandatory nature of the "operating subsidy" program. The second concerns the exercise of the Secretary's discretion, and will be considered in Part IV of this opinion.

The problem with the Secretary's arguments concerning the availability of the reserve fund is her initial premise. Were she authorized to "make" these additional assistance payments without a "contract to make" them, the program could operate independently of her available contract authority. I hold that she is so authorized.

The statute authorizes her to "make, and contract to make," (emphasis added) these payments. It also provides a source of funds from which she is to "make" these payments—the reserve fund discussed in subsection (g). That subsection directs that excess rental charges be paid to the Secretary, and credited to the reserve fund. These moneys are "to be used by the Secretary" to make the additional assistance payments. Whenever she "determines that the balance in the reserve fund is

adequate," she is to credit the excess charges to the appropriation authorized in subsection (i). These moneys "shall be available" until the end of Fiscal Year 1976, for implementing the "operating subsidy" program. As provided in subsection (f)(3), the payments may only be made after the Secretary determines that the operating cost increases sought to be subsidized are "reasonable" and "comparable" to those occurring throughout that community.

Congress thus established, in subsection (g), a special method for funding the "operating subsidy" program, under which the excess rental payments would automatically be ploughed back into the Section 236 program. When the Section 236 program was first established,⁴² the reserve fund was to be used to make interest reduction payments, "subject to limits approved in appropriation Acts pursuant to subsection (i)" of 12 U.S.C. 1715z-1.⁴³ The Housing and Community Development Act of 1974 changed both the purpose for which, and means by which, the reserve fund was to be spent. It directed that the fund henceforth go to the "operating subsidy" program, rather than for interest reduction payments, the Senate Report noting that the Committee considered this a "more appropriate" use of the fund.⁴⁴ Furthermore, as noted above, the fund would now be appropriated automatically, and hence available for distribution, once the Secretary determined its balance to be sufficient to implement the "operating subsidy" program. This new

if the "excess" funds derived from project operations were made available for the making of the additional assistance payments to offset operating costs. Accordingly, the bill provides that such excess rentals shall be credited to a fund which may be used by the Secretary for making the additional payments based on initial operating expense ratios, as described above. This provision would also be applied to projects in the current section 236 program. For these existing projects, it is expected that the Secretary would establish the "initial" ratios as of a date not later than 180 days after enactment of the bill.

procedure meant not have to appropriate the fund, provided remained within the budget set forth in the statute. In respect this funding the contract authority scheme considered *New York*.⁴⁵ Un- statute, direct payment of the reserve fund contract and, hence, the Secretary's authority.⁴⁶ Of course, she may choose to fund her available is also provided Congress explicitly native funding method.

The issue here is in *Train v. City of* the Secretary has spend the reserve "operating subsidy" language concerns mandatory, except Secretary responsible whether the balance

45. 420 U.S. 35, 95 (1975). See *partie* 420 U.S. 38, n.2, 95

46. Reference to the adopted in 1974 for discussed in note 32 here as well. 42 that:

"The Secretary shall for such annual guaranteeing their availability of funds Congress there requires operating cost subsidy a contract. Its *sub* requirement in *sub* lends further support the funding method.

47. In the Supplement Pub.L. 93-554, 88

48. 420 U.S. 35, 35 (1975).

49. S.Rep. No. 693, 2

50. Subsection (i) is 15 *supra*. See *Co. v. Atkinson*, 374

42. In 1968, by the Housing and Urban Development Act of that year, Pub.L. 90-448, 82 Stat. 498 (1968).

43. This was the original language of 12 U.S.C. § 1715z-1(g), as enacted in 1968.

44. S.Rep. No. 693, 93d Cong., 2d Sess. (1974). This portion of the report states:

"Under the current law, where tenants in a project are able to pay more than the basic rent the excess is returned to the Federal Government and may be used for the production subsidy now authorized. The Committee feels that it would be more appropriate

procedure meant that Congress would not have to approve appropriations to the fund, provided the amounts involved remained within the authorization ceiling set forth in subsection (i). In this respect this funding method is similar to the contract-authority and allotment scheme considered in *Train v. City of New York*.⁴⁵ Under this view of the statute, direct payments can be made out of the reserve fund, not pursuant to any contract and, hence, without reducing the Secretary's available contract authority.⁴⁶ Of course, the Secretary may choose to fund the program by using her available contract authority, as is also provided in subsection (f)(3). Congress explicitly authorized this alternative funding method later in 1974.⁴⁷

The issue here thus becomes, as it was in *Train v. City of New York*,⁴⁸ whether the Secretary has the authority not to spend the reserve fund to implement the "operating subsidy" program. All the language concerning the reserve fund is mandatory, except that making the Secretary responsible for determining whether the balance is adequate to fund

the program. Furthermore, the Act contains a strict compliance deadline, directing the Secretary to establish initial operating expense levels for existing Section 236 projects within 180 days.

The Secretary argues, however, that the legislative history supports her contention that the reserve fund need not be so used. She once again points to the phrase "may be used" in the Senate Report discussing the new program and the attendant changes in the use of the reserve fund.⁴⁹ However, here the language of the statute is clearly mandatory, and the presence of a possibly qualifying phrase in the legislative history cannot undercut that interpretation.⁵⁰

More important, the legislative history does not support the Secretary's position. The Senate Committee's phrase "may be used" must not be isolated from its legislative context. The Congressional hearings⁵¹ which led up to the Housing and Community Development Act of 1974 demonstrated that rising operating costs were endangering the viability of many Section 236 housing projects.

45. 420 U.S. 35, 95 S.Ct. 839, 43 L.Ed.2d 1 (1975). See particularly the discussion at 420 U.S. 38, n.2, 95 S.Ct. 839.

46. Reference to the operating subsidy program adopted in 1974 for public housing agencies, discussed in note 32 *supra*, may prove helpful here as well. 42 U.S.C. § 1437g provides that:

"The Secretary shall embody the provisions for such annual contributions in a contract guaranteeing their payment subject to the availability of funds."

Congress there required that the payment of operating cost subsidies be made pursuant to a contract. Its failure to include a similar requirement in subsections (f)(3) and (g) lends further support to my interpretation of the funding method it set up here.

47. In the Supplemental Appropriations Act, Pub.L. 93-554, 88 Stat. 1771 (1974).

48. 420 U.S. 35, 95 S.Ct. 839, 43 L.Ed.2d 1 (1975).

49. S.Rep. No. 693, 93d Cong., 2d Sess. (1974).

50. Subsection (g) is set forth in full at note 15 *supra*. See generally *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 82 S.Ct. 1328,

8 L.Ed.2d 440 (1962). See also *Train v. City of New York*, 420 U.S. 35, 44-46, 95 S.Ct. 839, 43 L.Ed.2d 1 (1975).

51. See generally "Hearings on Oversight on Housing and Urban Development Programs, Washington, D. C." Before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking, Housing and Urban Affairs, 93d Cong., 1st Sess., pts. 1 and 2 (1973). As Phillip N. Brownstein, Esq., a former HUD Assistant Secretary, testified on April 16, 1973:

"A continuing problem in the 236 program has been the under estimation of operating costs. Projects have been approved with unreasonably low cost figures and later as costs begin to mount rents have to be increased to levels that make the units too expensive for the income group contemplated." *Id.*, pt. 1, at 408.

Also helpful are the "Oversight Hearings" held at Chicago, Illinois earlier in 1973 and the Hearings on the Administration's 1973 Housing Proposals Before the Senate Committee on Banking, Housing and Urban Affairs, 93d Cong., 1st Sess. (1973). These latter hearings covered S.2490, S.2507, and S.2508.

These increased costs were passed on to the tenants, many of whom were forced to choose between spending far in excess of one-quarter of their incomes on shelter or leaving the housing project. And, as the Court of Appeals noted in *Commonwealth of Pennsylvania v. Lynn*, the project owners had a "strong interest" in attracting tenants with large incomes, rather than low-income tenants for whom the program was designed,⁵² since:

"all tenants must pay at least the 'basic rent,' i. e., their share of operating expenses plus amortization at an assumed one per cent. by themselves, tenants with a larger income are better able to absorb increases in the basic rent, which increases as operating expenses rise."

501 F.2d at 865-66. Thus, as enacted, the "operating subsidy" program was designed to insulate the tenants from these cost increases, to protect the project owners from vacancies and collection losses, and to preserve the low-income character of the Section 236 housing projects.⁵³ My review of this legislative history merely strengthens my conclusion that the Congress did not give the Secretary any discretion—full and absolute or otherwise—not to use the reserve fund to implement the "operating subsidy" program. The statute is mandatory, and the Secretary's refusal to implement the program is contrary to law.

52. HUD now favors lifting income ceilings for Section 236 projects, as its "solution" to the sharp increases in operating costs. See 24 C.F.R. 236.72, 40 Fed.Reg. 52844-45 (1975).

53. See S.Rep. No. 693, 93d Cong., 2d Sess. (1974) reported at 3 U.S.Code Cong. & Admin.News 4392 (1974). The Report provides:

"Section 502 of the bill authorizes a new program of rent subsidies for lower income families.

"This program appears as section 502 of the proposed Act and grows out of the existing rental housing housing assistance program (section 226 of the National Housing Act). However, while it retains features

IV.

If, however, the Secretary is correct in her contention that payments from the reserve fund can only be made pursuant to contracts, then those disbursements are subject to the Secretary's allocation of her contract authority. Accordingly, I turn now to her claim that she possesses discretion concerning the allocation of her contract authority, and that she has properly exercised it in deciding not to fund the "operating subsidy" program.

[4] I do not disagree with her basic contention, that she has discretion over how to allocate her contract authority among the various federal programs providing assistance to housing for which it might be used. Congress certainly vested her with this discretion by releasing such contract authority to her without specifying what programs were to be funded, or at what levels. Thus, it is unimportant whether or not there is a real conflict, as she claims, between her authority to implement the "operating subsidy" program and Congress' directive that she act to "meet the need for lower income housing."⁵⁴ The discretion to choose how to reconcile those objectives is necessarily vested in her office.

My task, therefore, is to evaluate how she has exercised this discretion. The decision not to fund, or implement in

of existing law, it also contains numerous improvements in that law so as to be, in many ways, a new program rather than a simple continuation of the old. It is believed that these changes—including provisions to promote a mix of families with more widely varying income levels and to prevent excessive rent increases and assist sponsors in meeting increases in operating costs beyond their control—will help eliminate a variety of problems and permit the program to operate more effectively in the future.

Section 502 of the bill became Section 212 of the Housing and Community Development Act of 1974.

54. See note 41 *supra*.

any fashion, the program is analogous to one of her predecessor's programs. Sections 235, 236, Here, as there, the program is a Congressional and funded program, narrow.⁵⁵ Accordingly, by the reasoning applied in *Commonwealth v. Lynn*,⁵⁶ whether it was a "rental subsidy" program, claims to have developed policies behind that program, the 236 and the National Housing Act's expected construction.

[5] My pursuit of the program was greatly assisted by the response to the earlier (or terminate) the programs. The Secretary accompanied the 1974 Housing and Community Development Act⁵⁷ stated that the Committee

"is distressed at the Administration's decision not to fund the program."

Administration's decision starts for low families. Some of the programs of housing were at the Committee's feeling that the Administration has justified the variety of unsupportable other things, it programs were

55. Secretary Romo's report on January 1974.

56. *Commonwealth v. Lynn*, 163 U.S.App.D.C. (1974).

57. *Id.*

58. S.Rep. No. 10 (1974) and S.Rep. Sess. (1974).

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any fashion, the "operating subsidy" program is analogous to the decision by one of her predecessors to suspend the Sections 235, 236, and 101 programs.⁵⁵ Here, as there, the discretion not to implement a Congressionally authorized and funded program is, at best, quite narrow.⁵⁶ Accordingly, I shall test her actions by the reasonableness standard applied in *Commonwealth of Pennsylvania v. Lynn*.⁵⁷ The question becomes whether it was reasonable for the Secretary not to implement the "operating subsidy" program, considering (as she claims to have done) the purposes and policies behind Congress' enactment of that program, the objectives of Section 236 and the National Housing Act, and the expected consequences of her decision.

[5] My pursuit of this inquiry is assisted greatly by the Congressional response to the earlier decision to suspend (or terminate) the Sections 235 and 236 programs. The Senate Reports⁵⁸ which accompanied the 1974 HUD Appropriations Act⁵⁹ stated that the Appropriations Committee

"is distressed and deeply concerned by the Administration's action to abandon our nation's historic housing program. . . . In January 1973 the Administration froze virtually all new starts for low and moderate income families. Some 17 housing programs or programs closely associated with housing were stopped. . . . The Committee feels that the Administration has justified its actions for a variety of unsupported reasons. Among other things, it has claimed that the programs were not achieving the goals

set by Congress, but by no stretch of the imagination is that correct."⁶⁰

That same Committee responded equally strongly to the decision in *Commonwealth of Pennsylvania v. Lynn* which upheld the legality of the suspensions discussed in the preceding paragraph. The Court in *Commonwealth of Pennsylvania v. Lynn* found as a fact that there were inherent structural problems with the Section 235 program, problems sufficient to justify the then-HUD Secretary's decision to suspend that program.⁶¹ The Court also found it "sufficiently plausible" that similar defects were inherent in the Section 236 program, and therefore it upheld the Secretary's conclusion that it was also impossible to administer that program consistently with Congressional intent.⁶²

However, the Congress apparently disagreed with these conclusions, for it extended the life of the Sections 235 and 236 programs for two years, until the end of Fiscal Year 1976, when it adopted the Housing and Community Development Act of 1974.⁶³ Indeed, the Senate Report which accompanied the subsequent HUD Appropriations Act took issue with "some judicial mistakes of fact," stating explicitly that:

"The Sections 235 and 236 programs suffered from both HUD mismanagement, and actual corruption, rather than from any inherent defects in the programs. In cities with good HUD management, such as Milwaukee, the program was a great success. In cities with rampant corruption among housing officials, it, along with other HUD programs, failed. But the failures in certain cities were not pe-

55. Secretary Romney suspended these programs on January 8, 1973.

56. *Commonwealth of Pennsylvania v. Lynn*, 103 U.S.App.D.C. 288, 501 F.2d 848, 862 (1974).

57. *Id.*

58. S.Rep. No. 1056, 93d Cong., 2d Sess. (1974) and S.Rep. No. 1001, 93d Cong., 2d Sess. (1974).

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59. Pub.L. 93-414, 88 Stat. 1095 (1974).

60. S.Rep. No. 1001, 93d Cong., 2d Sess. G (1974).

61. *Commonwealth of Pennsylvania v. Lynn*, 103 U.S.App.D.C. 288, 501 F.2d 848, 865 (1974).

62. 501 F.2d at 867.

63. Pub.L. 93-383, 88 Stat. 632.

cular to Sections 235 and 236 and, in fact, these programs were not the main ones affected or which failed, contrary to the opinion of the Department and some judicial mistakes of fact. The Department blamed the programs instead of its own mismanagement. As a consequence of this mismanagement, over 400 indictments have been handed down in housing fraud cases.

More than two-thirds of those receiving assistance receive lower subsidies each year because their incomes are rising, which was a major aim of the program. Some 50,000 Section 235 homebuyers have gone off subsidy altogether and, in the Committee's opinion, these are distinct measures of program success.⁶⁴

I consider myself bound by these expressions of Congress' confidence in these programs. The wisdom or effectiveness of the entire Section 236 program is not in issue in this case, but these statements by the Committee are relevant to an evaluation of the Secretary's decision not to implement the "operating subsidy" provisions of the Section 236 program.

The Secretary refuses to implement the "operating subsidy" program because she claims it is "inequitable." She points to what HUD perceives as a

"Need for a general multifamily default policy which will address itself to the economic difficulties facing owners and tenants of all HUD assisted multifamily projects."⁶⁵

She then contrasts this need with the limitations in the groups served and relief afforded by the "operating subsidy" program, and concludes that the public interest is better served by not funding

such a limited and discriminatory program.

The Congress, however, has specifically indicated its disagreement with precisely this sort of "all or nothing" analysis. The same Senate Report quoted above rejected a similar HUD argument in favor of the suspension decision, "that if not everyone could be subsidized under the program, no one should be subsidized."⁶⁶ The Committee urged the Secretary to implement the programs "concurrently" with the new Section 236 program, characterizing the "all or nothing" decision to halt the older programs as one based on "policy distaste," not "factual evidence." In response to that policy decision, as noted above, the Congress extended the life of the Sections 235 and 236 programs.

The same considerations apply to the "operating subsidy" program at issue here. It was added to Section 236 in 1974, for projects assisted under Section 236, as part of Congress' effort to improve the Section 236 program when it was reenacted. Congress adopted the "operating subsidy" provisions in response to the serious problem of operating cost increases due to sharp rises in oil prices and local property taxes.⁶⁷ The program was designed to assist only "deserving" projects, and their low income residents. HUD cannot now refuse to fund or implement the "operating subsidy" provisions because they only solve the particular problem for which they were designed, or because they only help the particular population for which they were enacted. The "operating subsidy" program does not have a counter-productive impact on our national housing effort merely because it does not solve all the present problems facing HUD's multifamily assistance programs. Surely Congress has the

power to solve a problem which it is familiar with, which it is familiar with, because it has not gone in the direction which the executive that Congress enacts subsidy" program those well-managed projects which had skyrocketing tax and the low income tenement projects.

The legislative process strengthens the Congress intended to be implemented, an available contract authority. As the Secretary Congress initially in her then-available to implement the program.⁶⁸ However a "clarification" of the Senate Report, the Secretary "authorized" contract authority program.⁶⁹ Further to consider the feasibility of the Section 236 projects.⁷⁰ could have spoken

68. Conf. Rep. H.R. No. 1001, 93d Cong., 2d Sess. 6 (1974). The vision reads:

"The conferees are visions relating to the new section by the Housing and Urban Development Act of 1974 to use balance of authority that may projects pursuant to

69. S. Rep. No. 1255, (1974). This report states: "The Committee of the joint explanatory Committee of Congress with respect to the subsidies for Section 236 Secretary is authorized contract authority for existing or new projects. This change was agreed Committee."

64. S. Rep. No. 1001, 93d Cong., 2d Sess. 6-7 (1974).

65. Affidavit of H. R. Crawford, Assistant Secretary for Housing Management of the Department of Housing and Urban Development, at 2 (October 15, 1975).

66. S. Rep. No. 1001, 93d Cong., 2d Sess. 7 (1974).

67. 120 Cong. Rec. S14897 (daily ed. Aug. 13, 1974), remarks of Senator Humphrey.

power to solve a specific problem with which it is familiar without running the risk of administrative nonenforcement because it has not gone far enough, or not gone in the direction considered desirable by the executive branch. I find that Congress enacted the "operating subsidy" program in an effort to help those well-managed Section 236 housing projects which had been the victims of skyrocketing tax and utility bills, and the low income tenants residing in those projects.

The legislative history of the funding process strengthens my conclusion that the Congress intended that this program be implemented, using the Secretary's available contract authority if necessary. As the Secretary notes in her brief, Congress initially forbade her from using her then-available contract authority to implement the "operating subsidy" program.⁶⁸ However later that year, in a "clarification" of the earlier Conference Report, the Secretary was specifically "authorized" to use her available contract authority to implement the program.⁶⁹ Furthermore, she was directed to consider this authority in evaluating the feasibility of proposed Section 236 projects.⁷⁰ Of course, Congress could have spoken more bluntly. It

might have mandated that the Secretary use her contract authority, and use it to fund the "operating subsidy" program. Indeed, the Secretary now argues that Congress' failure to do just that, in the face of her adamant refusal to fund the program, constitutes acquiescence with her decision. But Congress cannot be required to legislate two or three or more times before the executive must act. Where it has once spoken clearly, the duty to execute the law arises.⁷¹

I conclude that Congress has spoken clearly here. It extended the life of the Section 236 program, in spite of executive branch criticism and opposition.⁷² It rejected that criticism, which alleged that the program was unworkable and could not help everyone. It amended the program, to solve some of what it saw as the real problems which had developed. It set up a special funding method for the "operating subsidy" provisions of the program. It specifically permitted the use of contract authority as an alternate way to fund the new "operating subsidy" provisions. The Secretary's claimed rationale for refusing to fund the program with her contract authority—its inequitable coverage—misses the point of Congress' actions entirely and does not constitute a valid

68. Conf.Rep. H.R. No. 1310, 93d Cong., 2d Sess. 6 (1974). The report's pertinent provision reads:

"The conferees are also agreed that the provisions relating to operating costs subsidies in the new section 236 program authorized by the Housing and Community Development Act of 1974 shall not apply to the unused balance of outstanding contract authority that may be committed for new projects pursuant to this act."

69. S.Rep. No. 1255, 93d Cong., 2d Sess. 8 (1974). This report reads:

"The Committee wishes to clarify the intent of the joint explanatory statement of the Committee of Conference on H.R. 15572 with respect to the use of operating cost subsidies for Section 236 projects that the Secretary is authorized to use available contract authority for operating subsidies for existing or new 236 projects."

This change was agreed to by the Conference Committee:

"The conferees are agreed as to the clarifying intent of the language in the Senate Report relating to the utilization of operating subsidies for section 236 projects." Conf.Rep. H.R. No. 1503, 93d Cong., 2d Sess. 5 (1974).

70. S.Rep. No. 1255, 93d Cong., 2d Sess. 8 (1974). This section of the report reads:

"In evaluating the feasibility of any new project which is proposed to be assisted under the Section 236 program, the Secretary should take into account his authority to use operating cost subsidies in case there is an increase in utility costs and local property taxes."

71. *Commonwealth of Pennsylvania v. Lynn*, 163 U.S.App.D.C. 288, 501 F.2d 848, 801 (1974).

72. See S.Rep. No. 1091, 93d Cong., 2d Sess. (1974).

exercise of discretion. Thus, her decision not to implement the program in the face of these strong manifestations of Congressional sentiment is unreasonable. I hold that even if the use of contract authority were necessary to use the moneys in the reserve fund to implement the "operating subsidy" program, her refusal to do so in these cases constitutes an unreasonable exercise of her discretion.

V.

[6] The standards governing the issuance of preliminary injunctive relief are well-established in this circuit. The party seeking the injunction must combine a clear showing of probable success on the merits with the possibility of irreparable injury, or else raise substantial questions involving the merits, while demonstrating that the balance of hardships tips sharply in his/her favor.⁷³

[7] As the foregoing discussion demonstrates, I am of the opinion that the plaintiffs will almost surely succeed in obtaining permanent injunctive relief at the trial on the merits. The nature of the relief they seek, federal subsidies enabling them to continue in low-cost housing, and the nature of the harm they face if such relief is denied⁷⁴ persuade me that they will suffer irrepara-

ble injury if the Secretary is not ordered to continue payment of the "operating subsidy" pending my final ruling. HUD is not paying the full amount of any of these rent increases, but only that portion attributable to increases in local property taxes and utilities. In all three cases, however, this is a substantial portion of the total increase. In *Walter* it comprises 93% of the increase, in *Little* 23%,⁷⁵ and in *Dubose* nearly 100%. This constitutes a sufficient showing of irreparable injury to warrant the issuance of preliminary injunctive relief.⁷⁶

VI.

I have concluded that the plaintiffs are entitled to the preliminary injunctive relief they seek. Pursuant to my earlier orders, the operating levels for these three projects have already been determined. All that remains to set the program in motion is a determination by the Secretary that the balance in the fund is adequate to implement the "operating subsidy" program. The affidavits which have been submitted by the Secretary indicate that there is enough money in the reserve fund to finance the program for the remainder of this fiscal year. As of October 31, 1975 the balance in the fund was \$40,647,789.⁷⁷ The

Department estimation of the program would be \$4.3 million per year for the fiscal year 1976—the balance of the reserve fund authorized.⁷⁸ T required here is m which may be or Secretary's prior Therefore, I ord termine whether serve fund is ad mated additional due until the end

Once that dete only apparent ob ment of the subs ects is the requi creases they hav be "reasonable" those affecting s In view of the f approved the ren this litigation," upon these fig should not pre therefore order the required finc

Finally, once t implement the " gram by making order her to ma ance payments at these three 1 cording to the l

I need not rule o appear to be suffi fund to implemen program as it stan

78. Affidavit of I 15, 1975.

79. Subsection (2) reserve fund mo additional assista of the next fi adopted during F the two-year ext through the end construe the par section (g), ther

73. *Checker Motors Corp. v. Chrysler Corp.*, 405 F.2d 319, 323 (2d Cir. 1969).

74. Plaintiff *Dubose* alleges that, unless the rent increase were rescinded, her rent would constitute 61% of her income, and 78% of her "adjusted monthly income" as calculated according to the HUD Handbook, 4510.1 paragraph 10-7, page 10-6. The same figures apply to the other named plaintiff in *Dubose*, Ms. Daigle. The named plaintiffs in *Walter*, Ms. Walter and Mr. Cortese, would be required to pay 73% and 35.9% of their respective incomes, or 92% and 9.9%, again respectively, of their HUD calculated "adjusted monthly incomes." Ms. Little, named plaintiff in the third lawsuit here, alleges that 41% of her income and 52% of her "adjusted monthly income" will have to go for rent.

75. The dispute in *Little* concerning the applicability and effect of the provisions for separate utility metering, see note 15 *supra*, explains why this amount is so much lower.

As of this time the tenants at East Hartford Estates are paying their own electric bills, with the result that increases in electricity costs were not included in the proposed rent increase.

76. *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1019 n.33 (2d Cir. 1975).

77. Affidavit of H. R. Crawford, at 6, (Oct. 15, 1975), as supplemented by Letter of November 20, 1975 from Marjorie A. Wilhelm, Assistant U. S. Attorney, to this court. The plaintiffs in *Walter* contend that even this figure is too low, because of changes in the method for collecting the excess rentals promulgated by HUD in its Transmittal No. 24 of June 6, 1975, for inclusion in the Insured Project Servicing Handbook. That transmittal permits project owners to deduct their collection losses before making the required payments to the reserve fund. The plaintiffs are free to raise this issue at the trial on the merits.

INTERNATIONAL ADJUSTERS, LTD. v. M. V. MANHATTAN 1293

Cite as 405 F.Supp. 1293 (1975)

Department estimates that full implementation of the "operating subsidy" program would require approximately \$4.3 million per month,⁷⁸ or less than \$50 million for the remainder of Fiscal Year 1976—the last year for which this use of the reserve fund is presently authorized.⁷⁹ The determination required here is merely a ministerial act, which may be ordered by me despite the Secretary's prior refusal to perform it.⁸⁰ Therefore, I order the Secretary to determine whether "the balance in the reserve fund is adequate to meet the estimated additional assistance payments" due until the end of this fiscal year.

Once that determination is made, the only apparent obstacle to continued payment of the subsidy to these three projects is the requirement that the cost increases they have suffered be found to be "reasonable" and "comparable" to those affecting similar rental projects.⁸¹ In view of the fact that HUD has itself approved the rent increases which began this litigation,⁸² based at least in part upon these figures, that requirement should not present any problem. I therefore order the Secretary to make the required finding, if proper.

Finally, once the Secretary is ready to implement the "operating subsidy" program by making these determinations, I order her to make the additional assistance payments on behalf of all tenants at these three projects who qualify according to the language set forth in 12

I need not rule on it at this time as there appear to be sufficient moneys in the reserve fund to implement the "operating subsidy" program as it stands now.

78. Affidavit of H. R. Crawford, at 6 (Oct. 15, 1975).

79. Subsection (2) of Section 226 permits the reserve fund moneys to be used to make the additional assistance payments "until the end of the next fiscal year." The Act was adopted during Fiscal Year 1975, and contains the two-year extension of the 226 program, through the end of the 1976 Fiscal Year. I construe the phrase "next fiscal year" in subsection (g), therefore, to refer to Fiscal Year

U.S.C. § 1715z-1(f)(3), i. e., the classes previously certified. In view of the fact that these determinations should have been made by the Secretary long ago, I order that she continue to pay the operating subsidies, as directed by the temporary restraining orders previously issued, until further order of this court.

This injunction may be modified on motion of any party, for good cause shown.

It is so ordered.



INTERNATIONAL ADJUSTERS, LTD.,
as agent and assignee and on behalf of
Ingosstrakh and Black Sea and Baltic
General Insurance Company, Ltd.,
Plaintiff,

v.

M. V. MANHATTAN, her engines, boilers,
etc., et al. Defendants.

No. 72 Civ. 919.

United States District Court,
S. D. New York.

Dec. 11, 1975.

Agent of maritime insurers commenced admiralty action seeking recovery of cargo's contributions to general average declared by owner of grain lad-

1976. I note in passing at this point that the Secretary also has available approximately \$55 million of unobligated contract authority, which she could use to implement the "operating subsidy" program. Affidavit of A. J. Kliman, at 3 (Oct. 9, 1975).

80. *Miguel E. McCarr*, 291 U.S. 442, 54 S.Ct. 465, 78 L.Ed. 901 (1934).

81. 12 U.S.C. § 1715z-1(f)(3) (Supp. IV, 1974).

82. Brief of Defendant Carla Hills, at 7. HUD also approved the \$10 per unit rent increase challenged in *Walter*. Brief of Plaintiff, at 10, and the \$9.36 per unit rent increase challenged in *Little*. Brief of Plaintiff, at 4.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

VERNICE DUBOSE, ET AL
vs.
CARLA HILLS, ET AL

CLAUDIA WALTER, ET AL
vs.
CARLA HILLS, ET AL

CIVIL NO. H-75-303

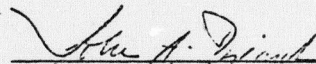
CIVIL NO. H-75-345

PLAINTIFFS' MOTION TO
AMEND CLASS CERTIFICATION

The plaintiffs in the above-entitled actions hereby move the Court to Amend the Class Certification entered in these two cases on October 15, 1975.

The reasons for the motion are there is developing a multiplicity of litigation in this District on like issues thereby making state-wide class certification appropriate, as is more particularly set out in the accompanying memorandum.

Respectfully submitted,



John A. Dziamba
Norman K. Japés
Dennis J. O'Brien
Tolland-Windham Legal Assistance
Program, Inc.
P.O. Box D - Willimantic, Conn.

James C. Sturdevant
Tolland-Windham Legal Assistance
Program, Inc. - P.O. Box 358
Rockville, Connecticut

Law Offices
TOLLAND-WINDHAM
LEGAL ASSISTANCE
INC.
Post Office Box D
Willimantic, Conn.
06226

CERTIFICATION

This is to certify that on this 24th day of February, 1976, a copy of the foregoing "Plaintiff's Motion to Amend Class Certification" was deposited in the United States Mail, postage prepaid, addressed to:

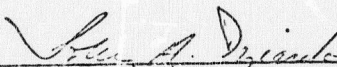
Marjorie A. Wilhelm, Esquire
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Marc S. Levine, Esquire
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Meriden, Connecticut 06450

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Civil Division, Room 3334
United States Department of Justice
Washington, D. C. 20530


John A. Dzianoa
Attorney for Plaintiffs

JUN 1 1975

U. S. ATTORNEY'S OFFICE
NEW HAVEN, CONNECTICUT

MAY 27 4 30 PM '75

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

VERNICE DUBOSE, ET AL

v.

CARLA HILLS, ET AL

CIVIL NO. H-75-303

CLAUDIA WALTER, ET AL

v.

CARLA HILLS, ET AL

CIVIL NO. H-75-345

JANETTE LITTLE, ET AL

v.

CARLA HILLS, ET AL

CIVIL NO. H-75-346

RULING ON PLAINTIFFS' MOTION
TO AMEND CLASS CERTIFICATION

These lawsuits, consolidated for trial, challenge Carla Hills' and the Department of Housing and Urban Development's refusal to implement an operating cost subsidy program^{1/} enacted as Section 212 of the Housing and Community Development Act of 1974.^{2/} This court issued a

^{1/} The suits also challenge the rent increases themselves, on due process grounds. Approval for the rent increases was obtained from HUD by the private defendants, owners of the Section 236 housing projects. The due process claims are not being pressed at the present time.

^{2/} Public Law 93-383. This section amended Section 236 of the National Housing Act, 12 U.S.C. § 1715a-1 (Supp. IV, 1974) amending 12 U.S.C. § 1715a-1 (1970).

temporary restraining order, postponing implementation of the rent increases, in each of the three cases. On December 15, 1975, a preliminary injunction was entered, based on this court's conclusion that the plaintiffs were likely to prevail on the merits, and would suffer irreparable injury if the subsidy program were not implemented immediately.^{3/}

Each of these cases was brought as a class action, and the classes have been certified as "those family units now residing, or who may at some future time reside, at one of the three Section 236 housing projects involved in this lawsuit who pay or will pay more than 30% of their 'adjusted family income' for rent"^{4/} Since my ruling in December, six more such suits have been filed in this District, four of which are now pending before me.^{5/} Only after the filing of these suits, and this court's issuance of temporary restraining orders and preliminary injunctions did the Secretary begin to implement the operating cost subsidy program for those projects.

^{3/} Dubose v. Hills, 405 F. Supp. 1277 (D. Conn. 1975).

^{4/} Id., 405 F. Supp. at 1280.

^{5/} ^α Pleasant v. Hills, Civil No. H 76-26; Morales v. Hills, Civil No. N 76-44; Adams v. Hills, Civil No. H 76-89; and Grundman v. Hills, Civil No. H 76-160. Johnson v. Hills, Civil No. N 76-109, is pending before Judge Newman. A ninth case, Mendez v. Hills, Civil No. 1. 76-168, was filed and then withdrawn in April.

The plaintiffs now seek to expand the class, converting the individual classes certified by project into a statewide class. In view of the Secretary's continued refusal to implement the operating cost subsidy program for all Section 236 projects, and the multiplicity of litigation on this issue now developing in the District of Connecticut, the motion to re-certify the class is granted.

The court has been informed by counsel for the government that there are 118 projects in the State of Connecticut which now receive interest subsidies under Section 236, have HUD/FHA insured mortgages, and have been finally endorsed.^{6/} One hundred of these have had at least one rent increase approved by HUD, or now have one pending. The court was notified on May 21, 1976, of eleven additional projects, eligible for assistance under Section 236, which either have not yet been finally endorsed or are not federal insured. Only one of these projects has had a rent increase. The court has also learned that Judge Pratt has recently certified a national class, the precise contours of which remain to be defined, in Underwood v. Hills, Civil No. 76-0469 (D.D.C.).

^{6/} Letter from Assistant United States Attorney Raymond L. Sweigart to the court, May 5, 1976.

^{7/} Letter from Assistant United States Attorney Raymond L. Sweigart to the court, May 19, 1976.

The requirements of Rule 23 are clearly met here. The members of the proposed class are certainly numerous, and the legal issue presented is identical--the proper construction of the 1974 amendments to Section 236. The claims of both plaintiffs and defendants in these three cases are typical of those available to the entire class, and I find that the plaintiffs' counsel will without question adequately protect the interests of the plaintiff class.

As to the project owners, however, the representation requirement presents somewhat more difficulty. This court has no doubt as to the ability or zeal with which counsel for the owners of the three projects involved in these cases have protected their clients' interests. But they have not undertaken to represent the owners of all Section 236 projects in the State of Connecticut, and have not indicated to the court their willingness to do so. With respect to the construction of the operating subsidy provisions of Section 236 however, the private defendants are really mere bystanders; the true conflict is between the plaintiffs and HUD. The project owners will not "lose" whichever way the court interprets the statute, because they will either collect the increased rent from the tenants or receive a subsidy check from HUD. Since the statewide class certification is only with respect to the statutory issue, pursuant to Rule 23(b)(2) and (c)(4), I find that the project owners' interests can be adequately protected by the presence of counsel for the 236 projects named as defendants here. Ultimately, th

will be each defendant's choice, since each will have the option, after receiving notice,^{8/} of appearing with counsel of his choice.

Accordingly, two classes may be certified with respect to the plaintiffs' statutory claims. The plaintiff class will be comprised of all persons who now reside, or may at some future time reside, at one of the 101 housing projects in Connecticut eligible to receive an interest subsidy under Section 236 at which there has been a rent increase^{9/} and who pay or will pay more than 30% of their "adjusted family income" for rent as of the date the basic monthly rent was determined for each project. The private defendant class consists of the owners of the 101 Section 236 projects listed in Exhibit A. These classes may be supplemented if other project owners apply for and are granted rent increases. Those cases already filed and pending before me, listed in note 5 supra, are hereby consolidated with these three cases for trial purposes. Rule 42(a) Fed. R. Civ. P.

The posture of the pending cases has necessarily been altered by this certification of the statewide classes. The temporary restraining orders and preliminary injunctions

^{8/} Counsel for the plaintiffs agreed to accept responsibility for notice to all private defendants in the expanded class at the hearing on March 29, 1976. This notice should consist of the amended complaint and answer in Dubose v. Hills, Civil No. H 75-303, and a copy of this order. Notice should be served by June 10, 1976.

^{9/} Attached as Exhibit A to this Order.

already issued in the consolidated cases directed the Secretary to determine those projects' initial operating expense levels, and the portion of their rent increases attributable to rises in taxes and utilities, as set forth in subsection (f)(3) of Section-236. This same relief is necessary to enforce the existing preliminary injunction with respect to the remaining Section 236 projects.

The Secretary is hereby ordered to make those calculations for the projects now part of the certified class. After those determinations are made, HUD and the private defendants must compute the total operating cost subsidy available to each project, based on a 30% income figure for each tenant. Once these per tenant subsidy figures have been calculated, the Secretary must make the statutorily required findings as to the reasonableness of the rent increases and the amount in the reserve fund, if proper, as required by my earlier order. Finally, HUD is enjoined from refusing to pay those subsidies to each project owner, commencing with the rental payments due June 1, 1976, or the effective date of the rent increase, whichever is later.^{10/} HUD is directed to make these determinations and the subsidy payments as rapidly as possible, but in no event later than July 1, 197

10/

All members of the plaintiff class may eventually be entitled to reimbursements dating back to February 1975 or the effective date of the rent increase at their project. But the exact scope of relief must await the final determination of the merits.

After HUD makes those payments, the private defendants must reimburse their tenants in the amount of the subsidy credited to each tenant.

This order may be modified on motion of any party for good cause shown. It is

SO ORDERED.

Dated at Hartford, Connecticut, this 22nd day of May, 1976.

M. Joseph Blumenfeld
M. Joseph Blumenfeld
United States District Judge

JUN 17 1976

U.S. DISTRICT COURT
NEW HAVEN

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

VERNICE DUBOCH, ET AL :
v. : CIVIL NO. H-75-303

CARLA HILLS, ET AL :

CLAUDIA WALTER, ET AL :
v. : CIVIL NO. H-75-345

CARLA HILLS, ET AL :

JANETTE LITTLE, ET AL :
v. : CIVIL NO. H-75-346

CARLA HILLS, ET AL :

JOANN JOHNSON, ET AL :
v. : CIVIL NO. H-75-109

CARLA HILLS, ET AL :

MERRY E. CRUNDEN, ET AL :
v. : CIVIL NO. H-75-150

CARLA HILLS, ET AL :

: ORDER

The Government's motion to vacate the order of May 2
1976, certifying state-wide classes of plaintiffs and price

defendants, is denied. The preliminary injunction issued that day will continue in effect, with the date for compliance by USD extended to August 1, 1976, pursuant to the parties' stipulation.

The Government's motion for a stay of these orders pending appeal is also denied.

Dated at Hartford, Connecticut, this 28th day of June, 1976.

H. Joseph Blumensfeld
H. Joseph Blumensfeld
United States District Judge

c 11

76-6107

UNITED STATES COURT OF APPEALS

Second Circuit



At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of July, one thousand nine hundred and seventy-six.

Vernice Dubose, et. al., plaintiffs-Appellees,
v.
Carla Hills, et. al., Defendants-Appellants.
Claudia Walter, et. al., Plaintiffs-Appellees,
v.
Carla Hills, et. al., Defendants-Appellants.
Janette Little, et. al., Plaintiffs-Appellees
v.
Carla Hills, et. al., Defendants-Appellants.
Mae Pleasant, Plaintiff-Appellee
v.
Carla Hills, et al., Defendants-Appellants
Pantaleon Morales, et. al. Plaintiffs-Appellees.
v.
Carla Hills, et. al., Defendants-Appellants.

It is hereby ordered that the motion made herein by counsel for the

Carla A. Hills, Secretary of the Department of Housing
and Urban Development
appellant / ~~xxxxxx~~ ~~xxxxxxxxxx~~ ~~xxxxxxxxxx~~

~~xxxxxx~~ dated July 7, 1976 for a stay pending appeal

be and it hereby is ~~xxxxxx~~ denied.

~~xxxxxxxxxxxxxxxxxxxxxxxx~~

A. DANIEL FUSARO
Clerk

by *[Signature]*
Senior Deputy Clerk

BEFORE: HON. STERRY R. WATERMAN

HON. THOMAS J. NESKILL
Circuit Judge

HON. JOHN R. BARTELS

cc: Maryann Clifford, DOJ, Wash., D.C. District Judge ~~xxxxxxxxxx~~
Robert VomEigen, HUD, Wash., D.C.

41a

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

VERNICE DUBOSE, et al.,
Plaintiffs,

v.

CARLA HILLS, et al.,
Defendants.

Civil No. H-75-303

CLAUDIA WALTER, et al.,
Plaintiffs,

v.

CARLA HILLS, et al.,
Defendants.

Civil No. H-75-345

JANETTE LITTLE, et al.,
Plaintiffs,

v.

CARLA HILLS, et al.,
Defendants.

Civil No. H-75-346

MAE PLEASANT,
Plaintiff,

v.

CARLA HILLS, et al.,
Defendants.

Civil No. H-76-26

PANTALEON MORALES, et al.,
Plaintiffs,

v.

CARLA HILLS, et al.,
Defendants.

Civil No. N-76-44

CATHY ADAMS, et al.,
Plaintiffs,

v.

CARLA HILLS, et al.,
Defendants.

Civil No. H-76-89

JO ANN JOHNSON, et al.,
Plaintiffs,

v.

CARLA HILLS, et al.,
Defendants.

Civil No. N-76-109

MERRY ELLEN GRUNDMAN,
Plaintiff,

v.

CARLA HILLS, et al.,
Defendants.

Civil No. H-76-160

NOTICE OF APPEAL

Notice is hereby given that the federal defendants, Carla Hills and Lawrence Thompson, hereby appeal to the United States Court of Appeals for the Second Circuit from the order entered on May 27, 1976, by the United States District Court for the District of Connecticut which granted plaintiffs a preliminary injunction.

The federal defendants also appeal from the order entered on June 28, 1976, by the United States District Court for the District of Connecticut which denied federal defendants' motion to vacate the order and dissolve

the preliminary injunction entered on May 27, 1976.

Respectfully submitted,

Rex E. Lee

REX E. LEE
Assistant Attorney General
Civil Division

PETER C. DORSEY
United States Attorney

By:

Assistant United States Attorney

Stanley D. Rose

STANLEY D. ROSE

David Epstein

DAVID EPSTEIN

Paul T. Michael

PAUL T. MICHAEL

Attorneys, Department of Justice
Washington, D. C. 20530
Attorneys for Federal Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

VERNICE DUBOSE, et al.

Plaintiffs

v.

CARLA HILLS, et al.

Defendants

C.A. No. H-75-303

AFFIDAVIT OF ALBERT J. KLIMAN

Albert J. Kliman, being duly sworn, deposes and says:

1. I am the Director of the Office of Budget of the Department of Housing and Urban Development. In that capacity I serve as the adviser to and representative of the Assistant Secretary for Administration in matters relating to budget formulation and execution, and as adviser to the Secretary and Under Secretary with respect to these matters. I am responsible for the development of budget plans, policies and procedures, and for the overall supervision of the Office of Budget. The principal responsibilities of the Office of Budget are:

- (a) To advise the Assistant Secretary for Administration and other high level officials of the Department including the Secretary and Under Secretary on budget matters, including the budgetary implications of policy and legislative proposals;
- (b) To advise Assistant Secretaries and staff officers on their budgetary responsibilities, to evaluate the effectiveness of these activities and to exercise technical and functional supervision with respect to all budget activities throughout the Department; and

(c) To prepare or review all consolidated or Department-wide budget estimates for submission to Office of Management and Budget and the Congress.

2. It is the purpose of this affidavit to state the manner in which the Congress has made available contract authority and appropriated funds to carry out the provisions of Section 236 of the National Housing Act as amended. It is also the purpose of this affidavit to state how the Department has programmed the unreserved balance of contract authority made available by Congress to carry out the Section 236 program.

3. "Contract authority," as used in this affidavit, refers to the means by which contracts are entered into under statutory authority which provides for a commitment of Federal fund payments, now and in the future, up to a stipulated limit, prior to an appropriation of funds for the liquidation of such contracts. With respect to the Section 236 program, contract authority permits the Department to enter into contracts to make annual payments, such as interest reduction payments, which are authorized by Section 236 of the National Housing Act, as amended, for certain future periods. Congress makes contract authority available under the Section 236 program through a two step process. First, there must be an authorization of contract authority contained in the substantive legislation. Second, the contract authorization, or portion thereof, must be released to the Department in an appropriations act. The Department may then enter into contracts to make annual payments authorized by Section 236 up to the limit established in the appropriations act releasing such contract authority.

4. "Appropriation," as used in this affidavit, refers to an authorization in an appropriations act to draw funds from the Treasury for specified purposes and to make disbursements of these funds. With respect to the Section 236 program, appropriations provide the Department with funds to liquidate contracts for payments authorized by Section 236 of the National Housing Act, as amended, which were entered into pursuant to contract authority released by Congress for that purpose.

5. Congress has released no contract authority specifically for contracts for the payment of operating subsidies authorized by Section 236(f)(3) and (g) of the National Housing Act, as amended by Section 212 of the Housing and Community Development Act of 1974. Section 236(i) of the National Housing Act, as amended by Section 212 of the Housing and Community Development Act of 1974, authorized \$75,000,000 of contract authority, subject to release in appropriations acts, to carry out the provisions of Section 236 of the National Housing Act, as amended, in Fiscal Year 1975. However, the Congress has released no contract authority in an appropriations Act pursuant to this authorization.

6. Although Congress has released no new contract authority for the Section 236 program, it has authorized the Department to use the contract authority it currently has available to carry out the provisions of Section 236 of the National Housing Act, as amended, to enter into contracts for the payment of Section 236 operating subsidies. See: Senate Report No. 93-1255, accompanying H.R. 16900, 93d Cong., 2d Sess., October 9, 1974, and H. Rpt. No. 93-1503, accompanying H.R. 16900, 93d Cong., 2d Sess., November 26, 1974.

7. As of July 31, 1975, the Department had an unreserved balance of contract authority in an amount aggregating \$120,151,891 for contracts authorized by Section 236 of the National Housing Act, as amended. The distribution of the unreserved balance is currently under-review in connection with the preparation of the Fiscal Year 1977 Budget. - No specific distribution has been made. However, the Department has about \$65 million of this contract authority set aside for bona-fide commitments. The balance is expected to be committed by the Department for (1) amendments to contracts for the payment of interest reduction payments on State-aided projects as authorized by Section 236(h) of the National Housing Act, as amended; and (2) "deep subsidies" mandated by Section 236(f)(2) of the National Housing Act, as amended by Section 212 of the Housing and Community Development Act of 1974.

8. Section 236(g) of the National Housing Act, as amended by Section 212 of the Housing and Community Development Act of 1974, provides that Section 236 project owners shall periodically pay to the Secretary all rental charges collected in excess of basic rental charges and that these excess rental charges shall be placed in a reserve fund by the Secretary. This section goes on to state that the Secretary may use the excess rental charges in the reserve fund to make operating subsidy payments to project owners by crediting the reserve funds to the appropriation authorized by Section 236(i), as amended. Section 236(i), as amended, in addition to authorizing appropriations to carry out the Section 236 program, provides that the Secretary has no more contract authority than that granted by appropriations acts. Therefore, the Department can use the \$37,823,293 balance in the reserve fund, as of August 31, 1975, for the payment of operating subsidies only to the extent that there exists sufficient unreserved contract authority released by Congress for that purpose. However, as is indicated in paragraph 7, the Department plans to commit its entire unreserved balance of contract authority for purposes other than contracts for the payment of operating subsidies.

Albert J. Korman
ALBERT J. KORMAN
Director, Office of Budget

Subscribed and sworn to before me on this 9th day of October, 1975.

Reinard E. Banks
NOTARY PUBLIC My Commission Expires June 30, 1976

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

VERNON DEBOSE, et al.

Plaintiffs

v.

C.A. No. H75-303

CAROL S. S., et al.

Defendants

AFFIDAVIT OF H. R. CRAWFORD

H. R. Crawford, being duly sworn, deposes and says:

1. I am the Assistant Secretary for Housing Management of the Department of Housing and Urban Development (HUD), and as such, I have responsibility pursuant to a delegation of authority from the Secretary published at 36 F.R. 5005, as amended, for all housing management functions of HUD, including all management activities under the National Housing Act, as amended.

2. The Department is extremely concerned with the problems threatening the economic viability of HUD insured and subsidized multifamily housing projects as well as the financial burdens imposed upon the low- and moderate-income tenants of these projects who must pay higher rents to meet the continuing rise in operating costs. Sharp rises in property taxes, utility rates and the cost of other goods and services essential to the operation of multifamily housing projects have brought about an alarming acceleration in the rate of defaults in mortgage payments by the owners of such projects. It is the position of the Department that a broad strategy, which will address itself to the problems of all HUD assisted multifamily projects, is necessary to alleviate what has become a financial crisis.

3. The operating subsidy provisions of Section 212 of the Housing and Community Development Act of 1974 is an attempt by the Congress to address the problem of increased operating costs in Section 236 projects by providing additional subsidies to the project owner. However, Section 212 does not authorize additional assistance for HUD assisted multifamily projects insured under other sections of the National Housing Act which face identical problems.

4. Section 212 of the Housing and Community Development Act of 1974 authorizes the payment of operating subsidies to Section 236 project owners only to the extent necessary to maintain the basic rental charges for tenants at levels not in excess of 30 percent of their gross income. Therefore, the benefit of operating subsidies flows only to those Section 236 projects which are occupied by tenants whose basic rental charge exceeds 30 percent of their gross income. There are Section 236 projects in which a majority or all of the tenants occupying its units pay a rental charge which does not exceed 30 percent of their gross income. Consequently, the payment of operating subsidies will have little or no ameliorating effect upon the economic difficulties threatening the owners of a number of Section 236 projects.

5. The payment of operating subsidies solely to Section 236 project owners, therefore, is inequitable in providing relief only to a small proportion of HUD assisted multifamily projects and to an even smaller group of beneficiaries -- those owners of Section 236 projects whose tenants have a basic rental charge exceeding 30 percent of gross income. In view of the need for a general multifamily default policy which will address itself to the economic difficulties facing owners and tenants of all HUD assisted multifamily projects, the Department is currently considering a number of alternative proposals for solutions that are more comprehensive and more equitable.

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6. There are two basic approaches to affect the cash flow problems facing multifamily projects without raising the rental charges that the tenants must pay. The first is to provide additional subsidies for the projects to increase operating income. This approach does not affect the amount of the mortgagor's debt service payments. The other option is to decrease the debt service on the mortgage thereby freeing additional income for the operation of the project. There are a number of alternative methods to achieve the goals of each of these options. Some of the alternatives currently being considered by the Department are as follows:

- (a) A policy whereby mortgages are assigned to HUD and then recast to require a payment of principal and interest based upon current and foreseeable project income. The balance of the principal would not become due until the expiration date of the original indebtedness;
- (b) A policy whereby Section 8 units, authorized by the Housing and Community Development Act of 1974, would be allocated to distressed multifamily projects, thereby providing a base of rental income for the project which would rise with inflationary cost increases as they are sustained, and not affect the rent the tenants must pay;
- (c) A policy which permits Section 236 project owners to offset rents collected in excess of the basic rental charge against uncollected rents as a cushion against increased operating costs. Consideration is also being given to making this procedure retroactive for the excess rental collections which have been remitted to HUD pursuant to Section 236(g) of the National Housing Act, as amended;
- (d) A policy permitting extensions in the maturity date of the mortgage, thereby decreasing the project's debt service payments;

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- (e) A policy which permits the transfer of nonprofit projects to limited distribution ownership to improve management, i.e., management which is motivated by existing benefits available to owners of subsidized projects;
- (f) A policy which authorizes an increase in the tenant income limits for subsidized projects which, coupled with the increased use of rent supplements, would provide an increase in rental income while at the same time cushioning the impact of increased operating costs on lower income tenants; and
- (g) A legislative proposal to permit payment of a partial insurance claim (out of the insurance fund established by Section 238 of the National Housing Act, as amended) to the project owner which would reduce his mortgage indebtedness to a monthly amortization which he can afford to pay out of current income. A second note mortgage for the amount of the insurance claim paid would be held by HUD and be repayable under terms consisting of favorable interest rates and a deferred start of amortization.

7. A Multifamily Defaults Study was undertaken within the Department at the request of former HUD Secretary James T. Lynn. This study probed many of the alternatives currently being considered by the Department to alleviate the default problem in HUD assisted multifamily projects and evaluated the potential effectiveness of each alternative proposal. In addition, the Department helped launch a \$700,000 research and demonstration effort to gain new insight and answers to problems besetting some 60 financially troubled multifamily housing projects in the New York City area. These projects contain 16,500 dwelling units and represent mortgages totaling almost \$370 million.

8. Earlier in the year, the Department announced a temporary suspension of further referrals to the Department of Justice of additional foreclosures of HUD subsidized multifamily projects owned by nonprofit and limited dividend mortgagors, except in the case of abandonment or similar circumstances. In an effort to obtain the views of all interested public and private sources concerning HUD's policies on defaults in all HUD subsidized multifamily projects and the impact of defaults upon the low- and moderate-income tenants residing in such projects, the Department held public hearings on May 5 and 6, 1975. These hearings were designed to solicit the proposals of tenant groups, project owners and other representatives of the community at large on alleviating the default problem so that these proposals can be added to those currently being considered by the Department.

9. While the Department is engaged in examining the potential effectiveness of alternative proposals designed to alleviate the financial difficulties of all HUD insured and subsidized multifamily projects and the adverse impact of these difficulties upon the tenants of such projects, it has no plans to implement the provisions of Section 236(f)(3) and (g) of the National Housing Act, as amended, which authorize the payment of operating subsidies to Section 236 project owners. It is the position of the Department that the alternative proposals currently being considered provide a broader approach to the economic difficulties threatening multifamily project owners as well as the tenants of such projects.

10. Secretary Hills, Under Secretary Mitchell and I appeared before the Senate Committee on Appropriations on April 21 and 22, 1975. At these hearings, the intent of the Department not to implement the statutory authority to pay operating subsidies to Section 236 project owners, at this time, was made clear to the committee. The committee was concerned with options being considered by the Department to alleviate the multifamily default problem as well as the financial difficulties threatening the tenants of these projects. The Secretary, the Under Secretary and I discussed some of the alternatives being considered by the Department as


well as some of the methods proposed for their implementation. I also appeared before the Subcommittee on HUD and Other Independent Agencies of the House Committee on Appropriations at hearings held on April 14 through 18, 1975. At these hearings, the Subcommittee was informed of the Department's intent with respect to the implementation of the statutory authority to pay operating subsidies under the Section 236 program. Departmental spokesmen will continue to keep those committees fully informed concerning the progress made in the development of alternative solutions and the possible need for legislation in this area.

11. On July 29, 1975, the Department published an Interim Rule at 40 F.R. 31873, implementing the new Section 236(f)(2) of the National Housing Act. This regulation will provide additional rental assistance payments to a Section 236 project for tenants who cannot afford to pay the basic rental charge with 25 percent of their income. Rental assistance payments to eligible projects will normally be made available to 20 percent of the dwelling units. This Interim Rule was effective upon publication and the Department has provided a 60 day period for interested persons to file comment before adopting a final rule.

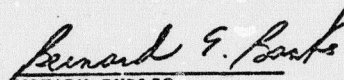
12. Pursuant to the request of the Secretary, I estimated the minimum amount of funds necessary to make operating subsidy payments to all Section 236 projects under management in Fiscal Year 1976, which commences July 1, 1975. Based upon calculations made by members of my staff, I estimated that it would cost approximately \$4.1 million per month or \$51.4 million per year to implement the operating subsidy program for all Section 236 projects under management in Fiscal Year 1976. The balance in the reserve fund established by Section 236(g), as amended, was \$37,823,293 as of August 31, 1975.

13. Section 236(g) of the National Housing Act, as amended, provides that during any period that the Secretary determines that the balance in the reserve fund, established by Section 236(b), is adequate to meet the estimated operating subsidy payments, as authorized by Section 236(f)(3),

the amount in the reserve fund shall be credited to the appropriation authorized by Section 236(i) and be available until the end of the next fiscal year (FY 1976) for the purpose of making operating subsidy payments. The Secretary has not determined that the balance in the reserve fund is sufficient to meet the estimated operating subsidy payments for the more than 3,650 Section 236 projects under management.


H. R. CRAWFORD
Assistant Secretary
for Housing Management

Subscribed and sworn to before me on this 15th day of October, 1975.


NOTARY PUBLIC
My Commission Expires June 30, 1976

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

VERNICE DUROSE, ET AL.)	
v.)	CIVIL NO. H-75-303
CARLA HILLS, ET AL.)	
-----)	
CLAUDIA WALTER, ET AL.)	
v.)	CIVIL NO. H-75-345
CARLA HILLS, ET AL.)	
-----)	
JANETTE LITTLE, ET AL.)	
v.)	CIVIL NO. H-75-346
CARLA HILLS, ET AL.)	
-----)	

AFFIDAVIT OF FRED W. PFAENDER

Fred W. Pfaender, being duly sworn, deposes and says:

1. I am the Director of the Office of Loan Management, Department of Housing and Urban Development (HUD). My responsibilities as Director include the development and recommendation of policies, and establishment of operating plans and procedures, for servicing HUD insured and subsidized multifamily housing projects. The information set forth in this affidavit is based upon my personal knowledge and information supplied to me by members of my staff.

2. The purpose of this affidavit is to supplement the Affidavit of Robert C. Odle, Jr., which was filed in these actions to explain the basis of the Department's plan to refund to certain Section 236 project owners those excess rentals which were erroneously remitted to HUD in amounts over those required by statute.

3. As stated in paragraphs 3 through 5 of the Odle affidavit, rentals which a tenant of a Section 236 project must pay is derived from the application of two principles: "basic rental charge" and the "fair market rental charge." A tenant is required to pay the "basic rental charge" or 25 percent of his adjusted income, whichever is greater. However, in no event will the rental exceed the "fair market rental charge."

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4. Pursuant to Section 236(g), a project owner is required to remit to the Department all rental charges collected which are in excess of the basic rental charges. The obligation of an owner to remit excess rentals to the Department is set forth in a "Regulatory Agreement" entered into between the owner and the Department. A sample of a Regulatory Agreement is attached hereto as Exhibit A.

5. Paragraph 4(i) of the Regulatory Agreement provides that project owners:

"Shall remit to the Commissioner [Secretary] on or before the 10th day of each month the amount by which the total rentals collected on the dwelling units exceeds the sum of the approved basic rentals for all occupied units, which remittance shall be accompanied by a monthly report on a form approved by the Commissioner, provided that a monthly report must be filed even if no remittance is required."

The form approved by the Secretary to accompany this monthly remittance is HUD Form 3104. As set forth in the Odle affidavit, this form was revised in June 1975 to clarify the formula for calculating excess rentals. Prior to this revision, HUD Form 3104 did not provide for a loss incurred in one month to be carried forward so that it offsets actual rent collected in following months.

6. Paragraph 11 of the Regulatory Agreement provides that, upon a violation of any of the provisions of that Agreement, the Secretary may declare the project owner to be in default of his obligations under the Regulatory Agreement unless the violation is corrected within 30 days of the notice to the project owner of the violation. If such a default is declared, the Secretary may, among other things, require the project owner's indebtedness immediately due and payable and then proceed with a foreclosure of the mortgage. (The Secretary's remedies in the event of the project owner's noncompliance with "any" provision of the Regulatory Agreement are set forth in paragraph 11(a) through (e)).

7. A similar provision is set forth in the "Interest Reduction Payment Contract," which constitutes the contract between HUD and the mortgagee for Section 236 assistance. That contract appears at 24 C.F.R. 236.501 et seq.

Section 236.510(b)(3) provides that the Secretary may terminate interest reduction payments made to the mortgagee on behalf of the project owner (mortgagor) if that project owner fails to meet his obligations under the Regulatory Agreement.

8. As stated in paragraph 7 of the Odle affidavit, instructions for calculating excess rentals pursuant to Section 236(g) of the National Housing Act were set forth in HUD's Insured Project Servicing Handbook. Prior to June 1975, the date of issuance of Transmittal Notice No. 24 which amended that Handbook to provide new instructions for calculating excess rentals, the Insured Project Servicing Handbook contained, at Chapter 4, Section 3, paragraph 9(a), a set of "Delinquency Follow-up Steps." These Delinquency Follow-up Steps were intended to provide HUD management personnel with a step-by-step procedure for exercising the authority contained in paragraph 11 of the Regulatory Agreement and 24 C.F.R. §236.510(b)(3) to take punitive action in the event of a project owner's noncompliance with the requirement of the Regulatory Agreement pertaining to remittance by the project owner of excess rentals. This procedure was to be followed in all cases in which Section 236 project owners fail to submit either Form 3104 or any excess rentals collected for the month. Under the terms of this procedure, if voluntary compliance could not be obtained, the Department, "will automatically suspend the interest reduction payments beginning with the next payment due to be paid." (Handbook HM 4350.1, Chapter 4, Section 3, paragraph 9(a)(4)) See Exhibit B, Transmittal Notice No. 12, which amends Chapter 4 of Handbook HM 4350.1.

9. Therefore, Section 236 project owners were subject to the imposition of sanctions for noncompliance with "any" provision of the Regulatory Agreement, including the provision requiring the remittance of excess rentals each month on a form approved by the Secretary. Prior to June 1975, that form (HUD Form 3104) did not provide instructions which permitted project owners an offset for rents not collected in prior months. Consequently, project owners were required to remit all rentals collected in excess of basic rentals. The "Delinquency Follow-up Steps," contained in Handbook HM 4350.1 provided a procedure to be followed in circumstances where project owners did not remit any part of the excess rentals due for the month.

10. In addition to providing an offset for rents not collected in prior months, the revision to HUD Form 3104 in June 1975 provided project owners with instructions for making an "adjustment for vacancies" in computing the amount of excess rentals to be remitted to HUD. The following example is illustrative of the manner in which the adjustment of vacancy works:

HYPOTHETICAL

A project owner rents a vacant unit on the 15th day of the month. The basic rent for that unit is \$150, however, the income of the tenant renting the unit dictates that he pay \$160. In light of the fact that the unit is being rented for one-half of the month, the tenant is required to pay \$80 for that month.

Due to the lack of proper instructions accompanying HUD Form 3104 prior to June 1975, certain project owners would compute the excess rental for the hypothetical unit as follows:

<u>BASIC RENT</u>	<u>AMOUNT ACTUALLY COLLECTED</u>	<u>EXCESS</u>
\$150	\$80	\$0

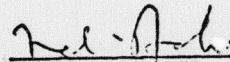
Since the \$80 actually collected is not in excess of the basic rent, certain project owners would remit no excess rental to HUD for that unit.

Under the terms of the instructions contained in revised Form 3104, project owners must add an "adjustment for vacancies" to the amount of rent actually collected. The adjustment equals the pro rata share of the basic rent for the portion of the month that the unit was unoccupied. Therefore, using the same hypothetical, the project owner must add \$75 (the pro rata share of the basic rent for the portion of the month that the unit was unoccupied) to the \$80 actually collected, and remit a \$5 excess rental to HUD for that unit.

<u>BASIC RENT</u>	<u>AMOUNT ACTUALLY COLLECTED</u>	<u>EXCESS</u>
\$150	\$155 (\$80 + \$75)	\$5

Had the unit in this hypothetical been rented for the entire month, the project owner would have collected \$160 for that month, some \$10 over the basic rent

for the unit. Under the terms of revised Form 3104, if the unit is rented for one-half month, the project owner collects \$80, adds a \$75 adjustment, for a total of \$155, some \$5 over the basic rent for the unit. Therefore, if the unit is rented for one-half month, the amount of the excess to be remitted to HUD is one-half of the excess which would have to be remitted if the unit is rented for the entire month.



FRED W. PFAENDER
Director, Office of Loan Management

Subscribed and sworn to before me on this 26th day of MARCH 1976.


NOTARY PUBLIC

My Commission Expires JUNE 30, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

VERNICE DUBOSE, et al.,

v.

CARLA A. HILLS, et al.,

Civil Action
No. H-75-303

CLAUDIA WALTER, et al.,

v.

CARLA A. HILLS, et al.,

Civil Action
No. H-75-345

JANETTE LITTLE, et al.,

v.

CARLA A. HILLS, et al.,

Civil Action
No. H-75-346

AFFIDAVIT OF FRED W. PFAENDER

Fred W. Pfaender, being duly sworn, deposes and says:

1. I am the Director of the Office of Loan Management, Department of Housing and Urban Development ("HUD"). My responsibilities as Director include the development and recommendation of policies, and establishment of operating plans and procedures, for servicing HUD insured and subsidized multifamily housing projects. The information set forth in this affidavit is based upon my personal knowledge and information supplied to me by members of my staff.

2. The purpose of this affidavit is to bring to this court's attention the facts surrounding the Department's decision to refund to certain owners of projects insured under Section 236 of the National Housing Act, a substantial portion of the sums previously derived from them and presently credited to the excess rental reserve fund established by Section 236(g) of the National Housing Act, as amended. It is also the purpose of this affidavit to inform the court of the effect of this decision upon the requirements of this court's "Ruling on Plaintiffs' Motion for Preliminary Injunction," dated December 15, 1975.

3. Section 236 was added to the National Housing Act in 1968 to encourage private enterprise to engage in the development of good rental and cooperative housing for lower income families. It authorizes the provision of mortgage insurance and assistance in the form of periodic subsidy payments to an eligible mortgagee in order to reduce the mortgagor's interest costs on a market rate FHA-insured project mortgage down to one percent per annum. The interest subsidy, in turn, makes possible lower rentals to be paid by those occupants who qualify for Section 236 assistance. The rent a tenant must pay is derived through the use of two principles: The "basic rental charge" and the "fair market rental charge". The former is determined on the basis of operating the project with payments of principal and interest due under a mortgage bearing interest at the rate of 1 percent per annum. The latter is determined on the basis of operating the project with payments of principal, interest, and mortgage insurance premium which the mortgagor is obligated to pay under the mortgage.

A qualified tenant must pay the "basic rental charge" or 25 percent of his adjusted income, whichever is greater. However, in no case will a tenant's rental payment exceed the "fair market rental charge".

4. Prior to the 1974 amendments to Section 236, Section 236(g) provided that project owners, "shall, as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be deposited by the Secretary in a fund which may be used by him as a revolving fund for the purpose of making interest reduction payments"

5. This statutory requirement was inserted into the "regulatory agreement" which constitutes a contract between HUD and the project owner (mortgagor) for Section 236 assistance. Each regulatory agreement provides in pertinent part that the project owner shall remit each month to the Department, together with the appropriate reporting form, the amount by which the total rentals collected on the dwelling units exceed the sum of the approved basic rentals for all occupied units. Project owners are required to remit excess rentals to the Department along with HUD Form 3104, "Monthly Report of Excess Income". (Exhibit A) Instructions for calculating such excess rents were set forth in HUD's Insured Project Servicing Handbook.

6. In the latter part of 1973, it came to the attention of HUD's Office of Loan Management, the office responsible for implementing Section 236(g), that a great deal of uncertainty existed on the part of Section 236 project owners concerning the computation of excess rentals. After a review

which began in early 1974, the Office of the Assistant Secretary for Housing Management determined that the manner in which most project owners were computing excess income was not consistent with the statutory requirement as set forth in the regulatory agreement. Because of insufficient instructions accompanying HUD Form 3104, project owners had been making monthly computations of excess rents on a noncumulative basis which provided no offset for rents not collected in prior months. As a result of these miscalculations, project owners were erroneously remitting to HUD amounts in excess of the amounts due under the statutory requirement. The following example is instructive in demonstrating the manner in which this inequitable situation arose:

<u>BASIC RENT</u>	<u>TENANT OWES</u>	<u>(Cumulative) EXCESS, IF ANY</u>	<u>ACTUAL RENT COLLECTED</u>
<u>FIRST MONTH</u>			
120	150	30	150
100	100	--	100
110	120	10	---
120	130	10	---
---	---	---	---
450	500	50	250
<u>SECOND MONTH</u>			
120	150	60	150
100	100	--	100
110	240	20	240
120	260	20	260
---	---	---	---
450	750	100	750

As set forth in this chart, two tenants were delinquent in payment of their rent for the first month. This delinquency, however, was made up in the second month as a result of the payment of two months rent by the two delinquent tenants. In the second month, the project owner collected rents in the amount of \$750, some \$300 in excess of the sum of the basic rents (\$450) for that month. With no allowable offset for rents not collected in the first month, a project owner would be required to remit \$300 in excess rents to HUD. However, with the benefit of such an offset, the actual amount required to be remitted to HUD in the second month is \$100, which equals the aggregate amount collected in excess of basic rents for the first and second months.

7. The Department determined that the excess rental requirement contained in Section 236(g), properly interpreted, requires a project owner to utilize a method of computation of excess rentals which allows an offset for rents not collected in prior months. In June 1975, final clearance was given to Transmittal No. 24 (Exhibit B), which revised HUD's Insured Project Servicing Handbook to provide the following formula for calculating excess rents:

Total month's rent collections
Less basic rents for all occupied units
Less collection losses
Will equal excess rents

In that same month, HUD Form 3104 was revised to clarify the formula for calculating excess rents. Revised Form 3104 (Exhibit C), provides for a loss incurred in one month to be carried forward so that it offsets actual rent collected in following months. This revised Form 3104 does not represent a new procedure for calculating excess rentals,

but rather a clarification of the procedure which project owners should have been utilizing since the inception of the Section 236 program.

8. As a result of this clarification of the procedure for compliance with Section 236(g), a project owner now remits only the amount of excess rents properly computed as required by statute. However, no provision has yet been made to compensate a project owner for excessive payments previously remitted to HUD prior to June 1975. I have been advised by the Office of General Counsel that the Department is legally obligated to refund overpayments erroneously remitted by a project owner as a result of an incorrect interpretation of the requirements of Section 236(g) and the regulatory agreement. On the basis of this legal opinion, the Department has developed and is preparing to implement a procedure for refunding excess rentals erroneously remitted by making the formula set forth in revised Form 3104 and Transmittal No. 24 retroactive to the date that each project owner began remitting excess rentals to HUD. The Department estimates that approximately \$18 million is necessary to make these refunds.

9. On August 22, 1974, Congress enacted the Housing and Community Development Act of 1974. Section 212 of that Act amends Section 236(g) of the National Housing Act to provide that excess rentals shall be credited to a reserve fund which is available to make operating subsidy payments authorized by subsection (f)(3). This statutory provision states that, during any period that the Secretary determines that the balance contained in the reserve fund is sufficient to meet estimated operating subsidy requirements, it shall be credited to appropriations authorized by Section 236(i) and be

available until the end of the next fiscal year for the purpose of making operating subsidy payments. As set forth in the Affidavit of H.R. Crawford, the Secretary has not made such a determination for the following reasons:

(a) the Department has estimated that it will require an amount aggregating \$4.3 million per month or \$51.4 million per year to meet nationwide operating subsidy requirements for Fiscal Year 1976; and

(b) the amount contained in the reserve fund as of October 31, 1975, was \$40,647,789.00.

No mention was made in that affidavit of a potential charge upon the \$40,674,789.00 balance to make the refunds described in this affidavit.

10. In its Ruling on Plaintiffs' Motion for Preliminary Injunction, dated December 15, 1975, this Court stated as follows:

"As of October 31, 1975, the balance in the fund was \$40,647,789.00. The Department estimates that full implementation of the 'operating subsidy' program would require approximately \$4.3 million per month, or less than \$30 million for the remainder of Fiscal Year 1976--the last year for which this use of the reserve fund is presently authorized. The determination required here is merely a ministerial act, which may be ordered by me despite the Secretary's prior refusal to perform it. Therefore, I order the Secretary to determine whether 'the balance in the reserve fund is adequate to meet the estimated additional assistance payments' due until the end of this fiscal year". (reference to footnotes omitted)

11. In view of the fact that there is a charge upon the reserve fund for the sums necessary to refund excess rentals erroneously collected prior to June 1975, the Secretary cannot determine as a ministerial act that the balance is sufficient to meet estimated operating subsidy requirements for the remainder of Fiscal Year 1976. Although the

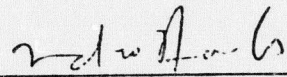
Department has estimated that \$18 million will be required to make such a refund, the precise amount required, which can only be accurately determined after project owners submit the necessary financial records, may exceed the \$18 million estimate. Were the Secretary to determine, pursuant to this court's Ruling, that the balance contained in the reserve fund is sufficient to meet estimated operating subsidy requirements for the balance of the current fiscal year, that entire balance must be credited to appropriations authorized by Section 236(1) and remain available until the end of Fiscal Year 1976 for the purpose of making operating subsidy payments. Under these circumstances, the Secretary would be unable to meet her legal obligation to refund to Section 236 project owners those excess rentals erroneously collected prior to June 1975.

12. Furthermore, in its Ruling on Plaintiffs' Motion for Preliminary Injunction, dated December 15, 1975, this court stated as follows:

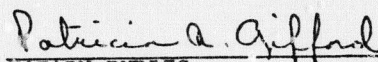
"Once that determination is made, the only apparent obstacle to continued payment of the subsidy to these three projects is the requirement that the cost increases they have suffered be found to be 'reasonable' and 'comparable' to those affecting similar rental projects. In view of the fact that HUD has itself approved the rent increases which began this litigation, based at least in part upon these figures, that requirement should not present any problem. I therefore order the Secretary to make the required finding, if proper".

Pursuant to the Court's order, the Department has determined

that the increases in the costs of utilities and local property taxes for the Section 236 projects involved in these cases are reasonable and comparable to cost increases affecting other rental projects in the community.


FRED W. PFAENDER
Director of the Office of Loan
Management

Subscribed and sworn to before me on this 14th day of April, 1976.


NOTARY PUBLIC

My Commission Expires JAN 31 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

VERNICE DUBOSE, et al.,

Plaintiffs,

v.

Civil Action No. H-75-303

CARLA A. HILLS, et al.,

Defendants.

AFFIDAVIT OF CARLA A. HILLS

Carla A. Hills, being duly sworn, deposes and says:

1. I am the Secretary of the Department of Housing and Urban Development. All of the functions, powers and duties of the Department, including those powers conferred by Section 236 of the National Housing Act, as amended, are vested in the Secretary. 12 U.S.C. 1702.

2. It is the purpose of this affidavit to inform the Court of the basis of my decision not to implement the statutory authority to make operating subsidy payments to the owners of projects insured under Section 236 of the National Housing Act, as amended, for this fiscal year.

3. Section 236(f)(3) of the National Housing Act, as amended, authorizes the Secretary to enter into contracts to make operating subsidy payments to the owners of Section 236 projects. It also provides the Secretary with the authority to make operating subsidy payments when they become due under the terms of these contracts. The dollar amount of contracts authorized to be entered into under this grant of authority, however, is limited by the amount of unreserved contract authority released by Congress for purposes authorized by

Section 236. By releasing such contract authority in appropriation acts, Congress places a statutory ceiling on the dollar amount of contracts to make future payments which may be entered into by the Secretary.

4. As of September 30, 1975, the most recent data for which figures are available, the Department had an unreserved balance of contract authority in an amount aggregating \$97,824,746 for contracts authorized by Section 236 of the National Housing Act, as amended. However, this total includes \$7,067,256 in program reservations which had been made but not formally recorded on the Department's accounting records. Therefore, as a realistic matter, the Department had available Section 236 contract authority aggregating only \$90,757,490 on that date. Under the terms of Section 236 of the National Housing Act, as amended, this unreserved balance could be utilized for three distinct purposes:

- a) contracts for interest reduction payments authorized by Section 236(a), as amended;
- b) contracts for deep subsidy payments authorized by Section 236(f)(2), as amended; and
- c) contracts for operating subsidy payments authorized by Section 236(f)(3) and (g), as amended.

5. The cost of implementing each of these programs has been estimated by the Department as follows:

A. Costs of Implementing the Interest Reduction Program

Interest reduction payments authorized by Section 236(a) of the National Housing Act, as amended, are periodic subsidy payments made by the Department to mortgagees in order to reduce the mortgagor's (Section 236 project owner's) interest costs on a market-rate FHA-insured

project mortgage. The interest subsidy, in turn, makes possible lower rentals to be paid by the project's tenants. Prior to January 5, 1973, the date of the Department's suspension of the Section 236 interest reduction program, the Department represented to certain entities, such as State and local governments, regional councils of government, local urban renewal, redevelopment or model cities authorities, developers of federally assisted new community projects, and the military, that it would enter into contracts with such entities for interest reduction payments on projects which were then being developed. Such entities proceeded with the preparation of plans for projects in reliance on these representations. After the program suspension in January of 1973, the Department announced that it would honor these promises which it termed "bona fide commitments." Among the proposed projects which received bona fide commitments are those necessary to provide needed housing for the elderly, for disaster victims, for areas determined to have a substantial need for accommodations for military personnel, for federally assisted new community projects, and to meet the statutory relocation housing requirement for urban renewal areas. I am informed that failure by the Department to honor such bona fide commitments would create chaotic conditions for such entities, which, in

reliance upon the Department's representations, have expended funds in preparation for the development of a project. I am also informed by my staff that these difficulties would be compounded in instances where the development of such projects is necessary to meet the low cost housing, relocation or other program requirements for federally assisted urban renewal, model cities or new community activities. The Department has estimated, on the basis of a project-by-project count, that the total cost of honoring outstanding bona fide commitments is \$48.6 million. This estimate was based upon the following data:

- 1) Bona fide commitments to 38 State-aided Section 236 projects, comprising some 13,563 units, are currently outstanding. The cost of making interest reduction payments on behalf of these projects, based upon current figures concerning the mortgage amount for each project, amounts to \$37,965,201;
- 2) Bona fide commitments to 56 non-State-aided Section 236 projects, comprising some 7,397 units, are currently outstanding. The cost of making interest reduction payments on behalf of these projects, based upon current figures concerning the mortgage amount for each project, amounts to \$10,673,871.

The Department therefore has set aside and intends to utilize \$48.6 million of the unreserved balance of Section 236 contract authority for bona fide commitments.

In addition to its obligation to honor outstanding bona fide commitments, the Department has entered into agreements with housing finance agencies the effect of which is to amend contracts for interest reduction payments on new Section 236 projects by increasing the amount of the interest reduction subsidy. Approximately two-thirds of these amendments will be made on behalf of projects assisted by State governments. Such amendments became necessary when the construction, debt service or other development costs of the sponsor exceed those estimated at the time that a fund reservation is made for the project. Where such increased costs lead to an increase in the principal or interest on the project mortgage, an increase in the amount of the interest reduction subsidy is necessary to insure the project's feasibility. These agreements to amend outstanding contracts under certain conditions constitute agreements to reserve contract authority and utilize it for such amendments. The Department estimates the cost of outstanding amendments to contracts for interest reduction payments at \$10.3 million. This estimate is based upon the following data:

- 1) There are currently outstanding 99 agreements between HUD and State-aided Section 236 projects to amend each project's contract for interest reduction payments. The sum of the cost of these 99 amendments amounts to \$4,682,463;

- 2) In addition to the amendments on State-aided projects, the Department has agreed to amend contracts for interest reduction payments on non-State-aided projects. The current average cost of these amendments is \$1.9 million quarterly. Based upon this figure, the estimated cost of these amendments for the balance of Fiscal Year 1976 (9 months) amounts to \$5.7 million. In order to meet its commitments under these agreements, the Department will utilize \$10.3 million of the unreserved balance of Section 236 contract authority.

B. Costs of Implementing the Deep Subsidy Program

Section 236(f)(2) of the National Housing Act, as amended, directs the Secretary to make so-called deep subsidy payments with respect to 20 percent of the dwelling units in any project assisted under a contract with the Department executed after August 22, 1974, the date of enactment of the Housing and Community Development Act of 1974. The minimum cost of making such deep subsidy payments, pursuant to the requirements of Section 236(f)(2) of the National Housing Act, as amended, has been estimated at \$29 million for the balance of Fiscal Year 1976, and the transition quarter which ends September 30, 1976. This estimate is based upon the following data:

- 1) There are currently 69,753 Section 236 units which were not placed under contract with the Department on or before August 22, 1974;

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- 2) The Department estimates that the families occupying 30 percent of the Section 236 units nationwide will be eligible for deep subsidy payments. This 30 percent figure represents the average of: (1) the statutory requirement that 20 percent of the units in each Section 236 project be eligible for deep subsidy payments; and (2) the statutory authority, which the Department has exercised, to increase the 20 percent requirement to meet the housing needs of elderly families. Forty percent of the units in elderly projects will be eligible for deep subsidy payments.
- 3) The current average per unit cost of making deep subsidy payments amounts to \$1,700 annually.

Therefore, in order to make the required deep subsidy payments for the balance of Fiscal Year 1976, and in the transition quarter, my staff informs me that the Department will utilize \$29 million of the unreserved balance of Section 236 contract authority. In the event that the Department exercises the authority, set forth in Section 236(f)(2)(A) and (B), as amended, to increase further the percentage of units in each project eligible for deep subsidy payments, an amount in excess of \$29 million will be necessary to implement the deep subsidy program.

In addition to this sum, I am told that the Department will utilize \$2.9 million of Section 236 contract authority to make deep subsidy payments to projects which had received a commitment by the Department for

interest reduction payments prior to August 22, 1974, but which were not finally endorsed nor receiving interest reduction payments until after that date. An amount in excess of \$2.9 million is estimated to be required for a full implementation of the deep subsidy program for these projects. However, the Department's balance of unreserved Section 236 contract authority will aggregate only \$2.9 million after \$48.6 million is utilized for bona fide commitments, \$10.3 million is utilized for amendments to contracts for interest reduction payments, and \$29 million is utilized for deep subsidies. Since the total unreserved balance is \$90.8 million, the only balance remaining to complete implementation of the deep subsidy program is \$2.9 million.

C. Costs of Implementing the Operating Subsidy Program

After the enactment of the Housing and Community Development Act of 1974, on August 22, 1974, former Secretary of the Department of Housing and Urban Development James T. Lynn requested that the Department estimate the cost of implementing the operating subsidy program for Fiscal Years 1975 and 1976. Thereafter, a nationwide survey was conducted by the Department's Office of Loan Management in order to develop the required cost estimates for implementation of the program. This survey covered one-third of the universe of Section 236 projects nationwide. On the basis of the financial information obtained as a result of this survey, the Department estimated that it would cost \$2,717,000 per month to implement the operating subsidy program in Fiscal Year 1975, and \$4,289,000 per month to implement that program in Fiscal Year 1976.

On the basis of this estimate, my staff informs me that the operating subsidy program for Fiscal Year 1976 would require an amount aggregating approximately \$51.4 million. The Department would require for that purpose \$51.4 million of the unreserved balance of Section 236 contract authority. Furthermore, since the costs of implementing the operating subsidy program will accelerate each year due to the general inflation in property taxes and utility costs, the Department will require contract authority greatly in excess of \$51.4 million to implement that program in subsequent fiscal years.

6. In Fiscal Year 1975 and thus far in Fiscal Year 1976, the Department utilized its unreserved balances of Section 236 contract authority to meet bona fide commitments to make interest reduction payments, amendments to contracts for interest reduction payments, and for contracts to make deep subsidy payments. The current unreserved balance of Section 236 contract authority has been programmed for the same purposes.

7. The sum of \$90.8 million of unreserved Section 236 contract authority is not sufficient to permit the Department to contract to cover the estimated costs of implementing the interest reduction, deep subsidy and operating subsidy programs for the current fiscal year. The estimated cost of such an implementation exceeds \$142 million. The \$90.8 million of unreserved Section 236 contract authority will be exhausted by the Department in meeting its obligations to honor bona fide commitments to make interest reduction payments, to amend contracts for interest reduction payments, and to make deep subsidy payments. In light of the insufficiency of the Department's unreserved balance of Section 236 contract

authority to implement all of the programs authorized by Section 236 of the National Housing Act, as amended, and upon the basis of staff analysis, I have determined that it is not feasible to implement the operating subsidy program for this fiscal year.

8. Although the Department cannot implement the operating subsidy program for this fiscal year, it will continue to take actions designed to alleviate the financial difficulties which motivated Congress to enact the operating subsidy amendments to Section 236 of the National Housing Act. The operating subsidy amendments were enacted to alleviate the financial hardships, generated by escalating utility rates and tax increases, which threaten the owners of HUD subsidized, multifamily projects and the tenants residing in those projects.

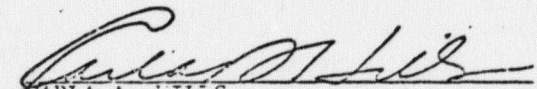
The Department has considered a number of alternative solutions to these financial problems and has begun to implement some of them. For example,

- a) Since February 1975, the Department has been operating under a moratorium on foreclosures of certain subsidized multifamily projects;
- b) Relief procedures, such as modification and suspension of the requirement that project owners maintain a reserve for replacement, have been liberalized;
- c) Owners of Section 236 projects, in computing excess income which must be paid to HUD and placed in the reserve fund, are permitted to deduct rents determined to be uncollectible and rent losses on unoccupied units; and
- d) A system has been instituted to alert HUD field office personnel of possible or pending defaults so that action to avoid the default can be taken before it occurs.

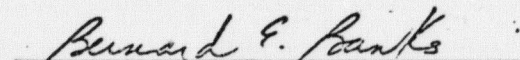
In addition to these actions, the Department has proposed and is preparing to implement a plan to allocate Section 8 subsidies, authorized by the Housing and Community Development Act of 1974, to those FHA-insured projects which are in danger of defaulting on their mortgage obligations. Such an allocation will assist occupants of Section 236 projects and other FHA-insured projects who, because of insufficient income, are unable to pay the rent required to support the project. The families occupying units in Section 236 projects which receive the benefit of Section 8 assistance will pay no more than 15 to 25 percent of their adjusted income toward rent. The balance of the approved rent for the unit will be paid to the project owner in Section 8 subsidies. No Section 236 contract authority will be required for implementation of this plan which will begin in this fiscal year.

9. In light of my determination that it is not feasible to implement the operating subsidy program for this fiscal year, I have not instructed HUD field office personnel to begin calculating the initial operating expense levels for Section 236 projects nationwide. These calculations would necessitate the expenditure by the Department of a great deal of time, effort and funds and, absent an ability to implement the operating subsidy program, would have no effect whatsoever upon the financial difficulties facing HUD-subsidized multifamily projects. Moreover, at any time that a decision is made by the Department to implement the operating subsidy program, the calculation of the initial operating expense levels can be made with no prejudice or resultant hardship to those projects eligible for such payments.

In light of the insufficiency of the Department's unreserved balance of Section 236 contract authority to implement all of the programs authorized by Section 236 of the National Housing Act, as amended, and the actions taken by the Department to alleviate the financial difficulties facing the owners and tenants of HUD+ subsidized multifamily projects, it is my judgment that the utilization of available Section 236 contract authority for bona fide commitments, amendments to contracts for interest reduction payments, and deep subsidy payments, to the exclusion of operating subsidies, is in the national interest and is required to meet the Department's outstanding obligations and commitments under Section 236 of the National Housing Act, as amended.


CARLA A. MILLS
Secretary

Subscribed and sworn to before me on this 3rd day of
FEBRUARY, 1976.


Notary Public
My Commission Expires June 30, 1976

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

VERNICE DUBOSE, et al.,
Plaintiffs,

v.

Civil No. H-75-303

CARLA HILLS, et al.,
Defendants.

CLAUDIA WALTER, et al.,
Plaintiffs,

v.

Civil No. H-75-345

CARLA HILLS, et al.,
Defendants.

JANETTE LITTLE, et al.,
Plaintiffs,

v.

Civil No. H-75-346

CARLA HILLS, et al.,
Defendants.

AFFIDAVIT OF THOMAS J. O'CONNOR

Thomas J. O'Connor, being duly sworn, deposes and says:

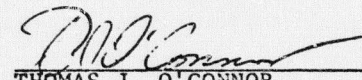
1. I am the Director of the Office of Finance and Accounting of the Department of Housing and Urban Development. My responsibilities include the authority to make payments pursuant to outstanding contracts entered into by the Secretary under authority contained in Section 236 of the National Housing Act, as amended.

2. Section 236 of the National Housing Act, as amended, authorizes the Secretary to make the following types of payments to Section 236 project owners:

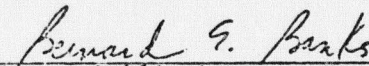
- (a) interest reduction payments authorized by Section 236(a), as amended;
- (b) deep subsidy payments mandated by Section 236 (f)(2), as amended; and
- (c) operating subsidy payments authorized by Section 236(f)(3) and (g), as amended.

3. Since the inception of the Section 236 program in 1968, all payments made under authority contained in Section 236 of the National Housing Act, as amended, have been made pursuant to outstanding contracts which provide for periodic subsidy payments to be made to the project owner over a period of years. As consideration for these periodic subsidy payments, the project owner contracts to comply with all of the rules prescribed by the Secretary for implementation of the Section 236 program.

4. It is and has been the position of the Department, since the inception of the Section 236 program, that the substantive provisions of Section 236 of the National Housing Act, as amended, require that no payments authorized or mandated by Section 236 may be made except pursuant to such a contract and that no contract for such payments may be entered into by the Secretary except pursuant to a release of contract authority by Congress for purposes authorized by Section 236.


THOMAS J. O'CONNOR
Director, Office of Finance and
Accounting
Department of Housing and Urban
Development

Subscribed and sworn to before me this 5th day of February 1976.


Notary Public

My Commission Expires JUNE 30, 1976

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

VERNICE DUBOSE, ET AL.

V.

CIVIL ACTION NO. H-75-303

CARLA HILLS, ET AL.

CLAUDIA WALTER, ET AL.

V.

CIVIL ACTION NO. H-75-345

CARLA HILLS, ET AL.

JANETTE LITTLE, ET AL.

V.

CIVIL ACTION NO. H-75-346

CARLA HILLS, ET AL.

STIPULATION

The plaintiffs and the federal defendant in the above entitled actions, by and through their undersigned counsel, hereby stipulate and agree as follows:

That the Order entered by this Court on May 27, 1976 in its ruling on Plaintiff's Motion to Amend Class Certification, which requires that HUD begin to make operating assistance payments to project owners on or before July 1, 1976 is hereby amended to extend the date for compliance to August 1, 1976.

LEGAL AID SOCIETY OF
HARTFORD COUNTY, INC.
200 MAIN STREET
HARTFORD, CONN. 06103
8000 800-0500

842

DATED: JUNE 28, 1976

Paul T. Michael

Paul T. Michael

United States Department of
Justice
Civil Division, Room 3334
Washington, D.C. 20530

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IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

VERNICE DUBOSE, SUSAN DAIGLE,
Individually and on behalf of
all others similarly situated,

PLAINTIFFS,

vs.

CARLA HILLS, Individually and in
her capacity as Secretary of the
United States Department of
Housing and Urban Development;
WINDHAM HEIGHTS ASSOCIATES, a
limited partnership; ANTHONY
ASSOCIATES, a general partnership;
and SIMON KONOVER, individually
and in his capacity as a general
partner in Windham Heights
Associates and Anthony Associates,

DEFENDANTS.

CIVIL ACTION
NO. H-75-303

I.
AMENDED COMPLAINT
PRELIMINARY STATEMENT

Plaintiffs are low income persons who are tenants in
Windham Heights Apartments, a federally subsidized Section 236
housing project designed for lower income families, situated in
Windham, Connecticut. On behalf of themselves and all other
tenants residing in Section 236 housing projects in the State of
Connecticut plaintiffs seek declaratory and injunctive relief to

Law Offices
TOLLAND-WINDHAM
LEGAL ASSISTANCE
INC.
Post Office Box D
Willimantic, Conn.
06226

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U. S. ATTORNEY'S OFFICE
NEW HAVEN, CONNECTICUT

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compel rescission of the defendant Secretary of HUD's approval of a \$20 per unit rent increase at Windham Heights Phase I and Windham Heights Phase II effective October 1, 1975 and all other increases approved by HUD at every other Section 236 housing project in Connecticut since the initial operating expense level was determined for each project. More specifically, plaintiffs ask this court to compel the defendant Secretary of HUD to provide them with an opportunity for a hearing prior to approval of any rent increase at Windham Heights I and II, to compel HUD to implement the operating subsidy provision mandated by section 212 of the Housing and Community Development Act of 1974, and to enjoin the private defendants from collecting rents in excess of those rates in effect prior to October 1, 1975.

Plaintiffs claim that they have been denied their rights under the National Housing Act as amended by the Housing and Community Development Act of 1974 by HUD's failure to provide the private defendants with an additional operating subsidy as required by 12 USC Section 1715 z-1(f)(3) and (g). By enacting the operating subsidy, Congress provided that the federal defendant shall make additional assistance payments to Section 236 project owners for increases in property taxes and utilities above the initial operating expense level for the project if the increase has produced a rental in excess of 25 to 30% of tenants' incomes. In addition, plaintiffs claim that the refusal of the defendant

Secretary of HUD to grant them a full and fair hearing before approving the private defendants' application for rent increases, wherein the plaintiffs can present their objections to said, application and to cross-examine any presentation made by the private defendants violates their rights under the National Housing Act, the regulations promulgated thereunder, and the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

II.
JURISDICTION

1. Jurisdiction is conferred upon this court by 28 U.S. Code Section 1331, which gives district courts jurisdiction over Civil Actions arising under the Constitution or laws of the United States when the matter in controversy exceeds \$10,000, exclusive of interests and costs, 28 U.S. Code Section 1337, which gives district courts original jurisdiction over civil actions or proceedings arising under any act of Congress regulating commerce 28 U.S. Code Section 1361, which grants district courts original jurisdiction of any action in a nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff, and section 10 of the Administrative Procedure Act, 5 U.S. Code Sections 701-704, which provide for judicial review of any final agency action over which there is no other adequate judicial remedy.

2. Plaintiffs' action for declaratory and injunctive relief is authorized by 28 U.S. Code Sections 2201, 2202 and rule 57 of the Federal Rules of Civil Procedure, which relate to declaratory judgments, and by Section 10 of the A.P.A., 5 U.S. Code Section 701-704, which authorizes review by "any applicable form of legal action, including actions for declaratory judgment or writs of prohibition of mandatory injunction . . . ".

3. This action arises under the National Housing Act, 12 U.S. Code Section 1701 et. seq., as amended by the Housing and Community Development Act of 1974, in particular 12 U.S. Code Section 1715 z-1(f) (3) and (g), requiring the defendant Secretary of HUD to pay certain additional operating subsidies to private owners and operators of Section 236 housing projects.

III.
PLAINTIFFS

4. Plaintiff VERNICE DUBOSE resides in a two-bedroom apartment at Windham Heights II with her two minor dependant children. Plaintiff DUBOSE's only source of income is the Connecticut Department of Social Services from which she receives \$295.00 per month through the AFDC flat grant program. Since she first took up occupancy at Windham Heights II in August of 1974, Plaintiff Dubose has been paying a monthly rental of \$160.00 for her apartment at Windham Heights II. As a result of the actions of defendants hereinafter described, effective October 1, 1975,

her monthly rent will be increased to \$180.00. Thus, with the approved rent increase her rent will constitute 61% of her income and approximately 78% of her "adjusted monthly income." (See HUD Handbook, 4510.1 paragraph 10-7, page 10-6).

5. Plaintiff SUSAN DAIGLE resides in a two bedroom apartment at Windham Heights I with her two minor dependent children. Plaintiff Daigle's sole source of income is the Connecticut State Department of Social Services from which she receives approximately \$295.00 per month under the AFDC flat grant program. Plaintiff Daigle originally moved into her apartment at Windham Heights in February of 1975. She pays a monthly rental of \$160.00 for this apartment. Plaintiff Daigle was recently notified by the private defendants that effective October 1, 1975, her rent will be increased to \$180.00 per month. Once the approved increase goes into effect plaintiff Daigle will be paying 61% of her income and approximately 78% of her "adjusted monthly income" for rent.

The approve rent increase will cause irreparable harm to be visited plaintiffs and their families. Unless they and their families choose to forego certain basic needs, plaintiffs will be unable to pay their monthly rent and will inevitably be dispossessed from their apartments and thereby forced to give up the substantial governmental subsidy which inures to the benefit of Section 236 project tenants.

Both plaintiffs are citizens of the United States and residents of the State of Connecticut.

IV.
DEFENDANTS

6. The Defendant CARLA HILLS is the Secretary of the Housing and Urban Development and is charged with administration of the provisions of the National Housing Act, 12 U.S. Code Sections 1701-1750(g), and in particular Section 236 of the Act, 12 U.S. Code Section 1715 z-1. She is also charged with administration of those provisions of the Housing and Community Development Act of 1974 which apply to the Section 236 housing program, in particular, 12 U.S. Code Sections 1715 z-1(f)(3)(g), which is contained in Section 212 of the Act. The Secretary of HUD is authorized in her official capacity to sue and to be sued in any court of competent jurisdiction.

7. Defendant WINDHAM HEIGHTS ASSOCIATES is a limited partnership whose principal place of business is located at 740 North Main Street, West Hartford, Connecticut. WINDHAM HEIGHTS ASSOCIATES is the owner of Windham Heights I and II in Windham, Connecticut. Defendant ANTHONY ASSOCIATES is a general partnership whose principal place of business is 740 North Main Street, West Hartford, Connecticut. ANTHONY ASSOCIATES is the management agent for Windham Heights and as such is responsible for the operation of Windham Heights I and II, including but not limited

to the activities regarding a proposed rent increase at Windham Heights I and II as hereinafter alleged. Defendant SIMON KONOVER whose principal place of business is Shawmet Road, West Hartford, Connecticut, is a general partner in Windham Heights Associates and a partner in Anthony Associates. The aforementioned private parties are necessary parties to this action as defendants under Rule 19 of the Federal Rules of Civil Procedure.

V.
CLASS ACTION

8.a. Plaintiffs bring this action on behalf of themselves and all others similarly situated pursuant to Rule 23(a) and (b) (2) of the Federal Rules of Civil Procedure. The plaintiff class is comprised of all persons who presently reside at any and every Section 236 housing project in the State of Connecticut or who may reside there in the future and who pay or will pay more than 25 to 30% of their "adjusted family income" for rent as of the date for each Section 236 project when basic monthly rent was determined. The requirements of Federal Rule 23 are met in that: the class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the representative parties will fairly and adequately protect the interests of the class; and the parties opposing the class have acted upon grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

b. The named defendant WINDHAM HEIGHTS ASSOCIATES, represents the class of Section 236 housing project owners in the State of Connecticut who have applied for and been granted rent increases from HUD subsequent to the determination of the basic monthly rental for each unit in each of their respective projects. The requirements of Rule 23 are met in that the class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative parties are typical of all claims of the class; and the representative parties will fairly and adequately protect the interests of the class.

VI.
FACTUAL ALLEGATIONS

9. The Section 236 Housing Program was created as part of the Housing and Urban Development Act of 1968, amending the National Housing Act, 12 U.S. Code Section 1701 et seq. The stated objective of these amendments was a reaffirmation of the goal of "a decent home and suitable living environment for every American family." To achieve this goal, Congress designed programs "to assist families with incomes so low that they could not otherwise decently house themselves." 12 U.S. Code Section 1701t. In particular, the Section 236 program was designed "for the purpose of reducing rentals for lower income families." 12 U.S. Code Section 1715 z-1(a).

10. Section 236 authorizes the Secretary of HUD to make periodic interest reduction payments on behalf of qualified mortgagors not to exceed the amount necessary to reduce the effective interest payments on the mortgage to one per cent per annum. The savings realized by this subsidy is passed on to the tenants in the form of reduced rental payments. 12 U.S. Code Section 1715 z-1 (f).

11. Qualified tenants pay no more than 25% of their "adjusted monthly income" for rent but must pay at least "basic rent" which is determined on the basis of a mortgage amortized at a one per cent interest rate and no more than "fair market rent" which is based upon a mortgage amortized at existing interest rates.

12. As a condition for receiving the benefits of the Section 236 program, project owners agree to be regulated with respect to rents, rent increase procedures, 24 C.F.R. Section 401.1, rate of return and method of operation, 24 C.F.R. Sections 236.1 and 425.3, including tenant eligibility, 24 C.F.R. Sections 236.5, 236.72, 425.19, 425.21, and 425.22, and leases, 24 C.F.R. Sections 236.75 and 425.23, and the definition of tenants' "adjusted monthly income", 24 C.F.R. Section 236.2, in a manner satisfactory to the Secretary of HUD.

13. The federal defendant is responsible for the implementation and administration of the Section 236 program.

As such HUD publishes and implements rules and regulations affecting project owners like the private defendant and has executed a Regulatory Agreement with the private defendant and made interest reduction payments to a mortgagee on behalf of the private defendant in accordance with such agreement.

14. Windham Heights Phase I, and Phase II, a 350 Unit Lower income housing project located on Windham Road, Route 6, in Windham, Connecticut, was constructed and financed pursuant to Section 236 of the National Housing Act, 12 U.S.C. §1715 z-1 et seq.

15. Plaintiffs and members of their class are low income families within the meaning of 28 U.S.C. §1715 z-1. As such, they rent units in Windham Heights I and II from defendants Windham Heights Associates and Anthony Associates and at other Section 236 projects in Connecticut at an amount substantially less than the fair market value of their units.

16. WINDHAM HEIGHTS ASSOCIATES, owners of Windham Heights I and II, and all other private defendants similarly situated, approved the applications for admission to the project filed by plaintiffs and the class they seek to represent on the basis of their relatively low income as eligible tenants and entered into lease agreements with them.

17. Under the terms of these lease agreements, plaintiffs are to pay rent at a rate substantially less than fair

market value for units comparable to theirs on the open market. Based upon information and belief, the difference between the amount of rent plaintiffs pay and the fair market value of their units when spread over the life of the developers' mortgage represents a value to each plaintiff in excess of \$10,000.

18. On or about June 20, 1975, defendant WINDHAM HEIGHTS ASSOCIATES through its agent, defendant Anthony Associates, began posting notices in the entry ways of the buildings of Windham Heights I and II notifying tenants that approval was to be sought from HUD to increase the maximum permissible rent for all units at the project. A copy of said notice is appended hereto as Exhibit A and incorporated by reference herein. The notice indicated that for Windham Heights I the defendants were proposing to increase the basic rent for one bedroom apartments from \$145 per month to \$155 per month, for two bedroom apartments from \$160 to \$180 per month, and for three bedroom apartments from \$180 to \$200 per month. For units in Windham Heights II the notices stated that the increases were to be \$20 per month per apartment, i.e., one bedroom from \$135 to \$155, two bedroom from \$160 to \$180 and three bedroom from \$180 to \$200.

The notice further stated that the proposed increase was needed due to increased costs in water and sewer and electricity, increased costs of fuel oil, and increased costs of bad debts and project related maintenance.

19. Said notices were not placed in every building on June 20, 1975, but in some cases many days thereafter. Based upon information and belief, plaintiffs contend that most of the notices did not remain posted for the 30 day period required by 24 C.F.R. §§ 401.2 and 401.4. Said notice did not comply with the requirements of 24 C.F.R. § 401.2 in that it made no reference to tenants' rights to have legal or other representation.

20. After inspecting documents supporting the requested rent increase, on July 17, 1975, plaintiffs' attorney sent a letter to the defendant Secretary of HUD's agent Bernard Cameron, Director of the Housing Management Branch at the HUD area office in Hartford, Connecticut, requesting that a hearing be scheduled concerning the requested rent increase. The letter requested that a hearing be held to give Windham Heights tenants an opportunity to present testimony and documentary evidence in support of their opposition to the requested rent increase, and to permit them to cross examine the owners of Windham Heights I and II and their agents under oath. No reply to this letter was ever received, nor was any hearing held.

21. On July 18, 1975, plaintiffs attorney sent a lengthy letter to said Bernard Cameron in care of the HUD Area Office in Hartford, Connecticut. The letter suggested the kind of questions tenants at Windham Heights would have wanted to raise at a hearing on the proposed rent increase. In the event a hearing would not be held, the letter requested that HUD examine

and investigate these issues before arriving at a final determination on the private defendants' request for a rent increase. A copy of said letter is appended hereto as Exhibit B and is incorporated by reference herein.

22. From June 28, 1975, until the private defendants' request for a rent increase was finally approved by HUD, a great many tenants sent letters to defendant Anthony Associates and HUD setting forth reasons for their opposition to the requested rent increase.

23. Based upon information and belief, plaintiffs contend that agents and employees of the defendant Secretary of HUD ignored the comments of the plaintiffs and their attorneys as conveyed to them in the aforementioned letters. Based upon information and belief, plaintiffs aver that defendants Windham Heights Associates and Anthony Associates did not "evaluate" the comments submitted to them by Windham Heights tenants as required by 24 C.F.R. §401.4.

24. To the best of the plaintiffs' knowledge, neither the defendant Secretary of HUD nor her agents and employees have established an initial operating expense level for Windham Heights I and II as required by Section 212(f)(3) and (g) of the Housing and Community Development Act of 1974, 12 U.S.C. §1715 z-1(f)(3) (g). The act requires this to have been accomplished not later 180 days after August 22, 1974.

25. At the request of the attorney for the plaintiffs, on August 6, 1975, defendant Anthony Associates in a letter to Bernard Cameron of the HUD Area Office at Hartford, Connecticut requested that HUD "... make a grant available to us to subsidize the increased cost of utilities and taxes in lieu of a rent increase ..." as provided for by Section 212 of the Housing and Community Development Act of 1974, 12 U.S.C. § 1715 z-1 (f) (3). To the best of the plaintiffs' knowledge, no such payments have been made or authorized.

26. Sometime in August of 1975, the defendant Secretary of HUD through her agents and employees approved the requested rent increase for Windham Heights I and II. Effective October 1, 1975, rent for each apartment unit size was to be raised the full amount requested by the private defendants.

27. Unless restrained by this Court, the private defendants will increase rents paid by plaintiffs and the members of their class effective October 1, 1975. This will result in grave hardship to the plaintiffs and the class they seek to represent in that it places them in serious danger of eviction due to their inability to pay the increased rent. These rent increase will go into effect without plaintiffs having been afforded either a meaningful opportunity to contest the rent increase prior to its approval by HUD, or their right to receive the benefits of the operating subsidy which mandates that these additional assistance payments be made to Section 236 project owners in

behalf of tenants whose rents have been increased as a result of increases in property taxes and utilities costs. The low income plaintiffs and the members of the class they seek to represent will suffer severe and irreparable injury if the approve rent increase is implemented on October 1, 1975, as scheduled.

VII.
FIRST CAUSE OF ACTION

28. Paragraphs 1 through 7 and 10 through 27 are hereby incorporated by reference the same as if fully pleaded herein.

29. The defendants have deprived the plaintiffs and the members of the class they seek to represent of their rights to Due Process of Law as guaranteed by the Fifth Amendment to the United States Constitution. Plaintiffs are beneficiaries of federal enactments and government actions related to the Section 236 housing program. Despite the fact that a substantial rent increase is definitely harmful to plaintiffs and the class they seek to represent, the defendant Secretary of HUD and her agents and employees have neglected and refused to give plaintiffs for whose benefit rents are restricted, or their responsible representative, a fair opportunity to rebut the contentions of the private defendants in seeking the rent increase. More specifically: (a) defendants have refused to respond in any way whatsoever to plaintiffs' contentions and failed to demonstrate that the proposed rent increase would be "reasonable to tenants",

economically justified, or valid pursuant to Section 236 of the National Housing Act, applicable published regulations, and pertinent provisions of various HUD publications governing management and operations of Section 236 Housing Projects; (b) the private defendants have not responded to the objections raised by the tenants and their attorneys, as required by law; (c) the steps taken by the private defendants to notify tenants of Windham Heights I and II that a rent increase was being requested was not sufficient compliance with HUD regulations governing that process; (d) the federal defendant and her agents and employees have refused to provide plaintiffs and their class with a full and fair hearing upon this matter prior to approval and implementation of the rent and; (e) the defendant Secretary of HUD and her agents and employees have failed to furnish the plaintiff class with a full statement of reasons justifying the approval of the rent increase, thereby failing to demonstrate that HUD's decision to approve the rent increase in its entirety was reasoned and not arbitrary, consistent with similar decisions, and in compliance with the standards of the National Housing Act and HUD regulations all in violation of plaintiffs rights to Due Process of Law and HUD's regulations and procedures.

VIII
SECOND CAUSE OF ACTION

30. Paragraphs 1 through 27 are hereby incorporated by reference the same as if fully pleaded herein.

31. The defendant Secretary of HUD's approval of the private defendants' request for a rent increase and her failure to allocate additional assistance payments to them in the form of an operating subsidy which has been provided for specifically by Congress to offset increased operating costs have deprived plaintiffs and the members of the class they seek to represent of their rights under Section 212 (f)(3) and (g) of the Housing and Community Development Act of 1974, 12 U.S.C. § 1715 z-1 (f)(3)(g).

32. Defendants's actions have violated plaintiffs rights under said Act in that the Act was intended to benefit plaintiffs and their class by providing decent housing to low income people. Plaintiffs are low income people within the meaning of the statute and the defendants' actions adversely affect plaintiffs' ability either to remain in the project, or, if they remain, require them to spend a higher amount of their disposable income on rental payments, a result clearly inimical to the purpose and interests said statute seeks to protect.

33. Plaintiffs and all members of their class have no adequate remedy at law, and have suffered and will continue to suffer irreparable injury as a result of the defendants' actions complained of herein.

IX.
THIRD CAUSE OF ACTION

Paragraphs 1 through 27 are hereby incorporated by reference the same as if fully pleaded herein.

34. On June 6, 1975, the federal defendant (effective September 1, 1975) (a copy of which is attached hereto as Exhibit C and is incorporated by reference herein), caused to be promulgated Transmittal No. 24 amending HUD Insured Project Servicing Handbook 4350.1, Chap. 4, §3 (a copy of which is attached hereto as Exhibit D and is incorporated by reference herein). In violation of 12 U.S.C. §1715 z-1(g), the transmittal permits Section 236 project owners to deduct their collection losses before making the required payments to the reserve fund provided for in subsection (g).

35. Plaintiffs and all members of their class allege that the federal defendant's promulgation and implementation of Transmittal No. 24 is in express violation of 12 U.S.C. §1715 z-1 (g).

36. Plaintiffs and all members of their class have no adequate remedy at law, and have suffered and will continue to suffer irreparable injury as a result of the defendants' actions complained of herein.

X.
PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and the Class they represent pray this Court to:

1. Assume jurisdiction of this cause and enter an order allowing this action to be maintained as a class action pursuant to Fed. R. Civ. P. 23(a) and (b)(2).

2. Enter a temporary restraining order and/or preliminary and permanent injunctions, pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining the defendants from implementing the rent increase challenged herein, from seeking to collect more than the previously established rents and from seeking to evict plaintiffs herein or any tenant of Windham Heights I and II for failure to pay the rent increases.

3. Enter a temporary restraining order and/or preliminary and permanent injunctions, pursuant to Rule 65 of the Federal Rules of Civil Procedures, enjoining the defendants from implementing any rent increase at Windham Heights I and II prior to granting plaintiffs a full and fair hearing wherein plaintiffs can present their objections to any proposed rent increase, rebut any presentation made by the private defendants, and have an opportunity to cross-examine the private defendants concerning their representations in support of their request for the rent increase.

4. Enter a declaratory judgment declaring that the actions of the private defendant and the class it represents and the federal defendant and her agents and employees complained of herein violates plaintiffs' rights under the National Housing Act, the Housing and Community Development Act of 1974, the regulations promulgated thereunder, and the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

5. Enter an order requiring the Defendant Secretary of HUD to establish an initial operating expense level for Windham Heights I and II as required by Section 212(f) (3) and (g) of the Housing and Community Development Act of 1974 and requiring her to pay to the private defendants any additional operating subsidy due under 12 U.S.C. §1715 z-1(f) (3).

6. Enter a declaratory judgment that the Federal defendant's promulgation and implementation of Transmittal No. 24 is in violation of 12 U.S.C. §1715 z-1 (g), order that the same be rescinded and that the private defendant and the class it represents be ordered to remit to HUD the collection losses they have deducted from the monies sent to HUD for deposit to the reserve fund.

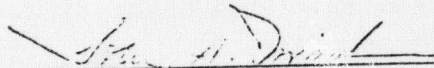
7. Award plaintiffs costs of this action.

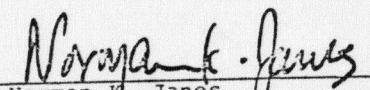
8. Award plaintiffs attorneys' fees. Grant plaintiffs such other and further relief as this Court may deem appropriate, just and proper.


THE PLAINTIFFS,

By 

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35 Village Street
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Their Attorneys

OF COUNSEL:

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National Housing and Economic
Development Law Project
Earl Warren Legal Institute
University of California
Berkeley, California
94720

CERTIFICATION

This is to certify that on this day of February,
1976, a copy of the foregoing Amended Complaint with Exhibits was
deposited in the United States Mails, postage prepaid addressed
to:

Marjorie A. Wilhelm, Esquire
Assistant United States Attorney
141 Church Street
New Haven, Connecticut 06450

Marc S. Levine, Esquire
8 Shawmet Road
West Hartford, Connecticut 06117

Roland Castleman, Esquire
740 North Main Street
Suite F
West Hartford, Connecticut 06117

Paul T. Michael, Esquire
Civil Division, Room 3334
United States Department of Justice
Washington, D.C. 20530

John A. Dziamba
Attorney for Plaintiffs

WINDHAM HEIGHTS II

EXHIBIT A.

JUNE 20, 1975
DATE OF NOTICE

WINDHAM HEIGHTS PHASE II to the United States Department of Housing and Urban Development (HUD). The proposed increase is needed for the following reasons:

1. Increased costs of WATER & SEWER and ELECTRICITY.
2. Increased costs of FUEL OIL.
3. Increased costs of BAD DEBTS AND PROJECT RELATED MAINTENANCE.

The rent increases for which we plan to apply are:

Bedrooms	Present Rent*		Proposed Increase*		Proposed Rent	
	Basic	Market	Basic	Market	Basic	Market
0	\$	\$	\$	\$	\$	\$
1	135		20		155	
2	160		20		180	
3	180		20		200	

All materials that we intend to submit to HUD in support of our application will be available during normal business hours at 740 North Main Street, West Hartford, Conn. for a period of 30 days from the date of posting of this notice for inspection and copying by residents of WINDHAM HEIGHTS PHASE II.

Residents of WINDHAM HEIGHTS II may submit comments in writing for or against the rental increase to us at 740 North Main Street, West Hartford, Conn. These will be transmitted to HUD with our application for an increase. You may also send a copy of your comments directly to HUD at the following address:

U.S. Department of Housing & Urban Development
999 Asylum Avenue (Hartford Area Office)
Hartford, Connecticut 06105

Attention: Director, Housing Management Branch

Re: FHA Project No. 017-44160

WINDHAM HEIGHTS II
(Name of Complex)

HUD may approve all, some, or none of the proposed rental increase. When HUD advises us in writing of its decision on our application, you will be notified at least 30 days before any allowable increase is put into effect.

Sincerely,

ANTHONY ASSOCIATES

Anthony A. Anthony

Anthony A. Anthony General Manager

WINDHAM LEGAL ASSISTANCE, INC.
OFFICES

Mary Ann Conklin
Richard T. Couture
Douglas M. Crockett
Norman Jones
Dennis J. O'Brien
James C. Sturdevant
Attorneys at Law

Please reply to Willimantic Office

EXHIBIT B.

Willimantic Office
746 MAIN STREET
POST OFFICE BOX D
WILLIMANTIC, CONN. 06216
Telephone 423-8423

Rockville Office
33 VILLAGE STREET
POST OFFICE BOX 330
ROCKVILLE, CONN. 06066
Telephone 872-0233

Danielson Office
112 MAIN STREET
POST OFFICE BOX 312
DANIELSON, CONN. 06219
Telephone 774-0433

July 18, 1975

Director
Housing Management Branch
United States Department of Housing
and Urban Development
999 Asylum Avenue
Hartford Area Office
Hartford, Connecticut 06105

Re: FHA Project Nos. 017-4416 - Windham Heights I;
017-44160 - Windham Heights II.

Dear Sir:

The tenants of Windham Heights I and II herein make a partial response to the request for an increase in the maximum permissible rents for the above named projects. In doing so they re-iterate, and in no way waive, their request for a hearing before you or some other proper officer. If a hearing were held the tenants would have been able to make a much more significant response to the requested increase. The owners of Windham Heights I and II have submitted financial statements in support of their request. The tenants believe that if they were able to question the owners and their agents and submit evidence of their own, they could show that the requested increase is not justified. Without a hearing, tenants can only hope to raise questions -- questions which we hope will be pursued in your inquiry -- about the validity of the owners' financial statement.

It is hoped that your office will consider the financial status of the owners, and of the tenants as well, as this request is evaluated. For this reason, individual tenants are submitting letters to describe what the proposed increases will do to them. A hearing would more amply demonstrate the human economic costs to the tenants. Your office must be aware that the tenants of Windham Heights I and II are at the low end of the economic scale.

Director, Housing Management Branch
U.S. Department of Housing and Urban
Development
Re: FHA Project Nos. 017-4416 and 017-44160

July 18, 1975
Page Two.

Those that are not on fixed incomes such as welfare and social security are employed at low wages unlikely to rise substantially. These tenants are already over extended in an inflationary economy. Many simply will not be able to afford such an exorbitant rent increase as the one sought here. Yet many have no other place to go. The owners present their claims in the cold terms of profit and loss. The tenants present their claims in terms of where to live and how to survive.

As indicated, this letter will raise questions about the owners' financial information in support of the proposed rent increase. For the sake of convenience, these questions will be taken in the order in which the information appears on the owners' profit and loss statements.

Vacancies:

The owners claim a rather high loss from vacancies, particularly in Windham Heights II. Why? Is it because the apartments were not tenantable; because no effort has been made to lease them; or because the owners' acceptance standards are too high?

Administrative Expenses:

The profit and loss statement shows a substantial sum paid as management fee. The same management firm is being paid two fees for the management of what is essentially one project. Is a double fee justified? If a hearing were held, the tenants would seek to discover the relationship between the management firm and the owners. The ultimate question to be pursued would be whether the management firm is not simply a mask for additional profits to the owners.

The profit and loss statement shows substantial administrative costs above the management fee which should not be allowed in computing the need for a rent increase, but rather should be considered as part of the management fee. According to the tenants' calculations, \$12,654 for Windham Heights I and \$13,661 for Windham Heights II (total \$16,315) should not be considered in establishing the need for a rent increase.

Director, Housing Management Branch
U.S. Department of Housing and Urban
Development
Re: FHA Project Nos. 017-4416 and 017-44160

July 18, 1975
Page Three.

Legal Expenses:

If a hearing were held, tenants could ask for a more specific accounting of legal expenses. How much, if any, of those fees claimed were for services unrelated to tenants at Windham Heights I and II? How much of that fee, for instance, reflects charges for preparation of tax forms? The tenants would also ask for an accounting of fees paid by evicted tenants and other defendants in suits by the owners. Have these fees been deducted from the amount charged on the profit and loss statement?

The tenants would also ask about the propriety of charging the cost of legal fees to all the tenants. Why should the present tenants who have not caused the owners to incur legal expenses pay for those who have?

Bad Debts:

The owners claim a rather large figure for bad debts. What is their criteria for determining what is or is not a bad debt? Do they have any effective debt collection procedures? The tenants again ask: why should those who are paying rent be asked to subsidize those who do not? It should also be pointed out that the figure for bad debts is inflated beyond any actual loss to owners. The loss from vacancies is deducted from rental income in addition to which the owners have security deposits to offset the loss from a defaulting tenant.

Fuel:

Tenants must concede that the cost for utilities has risen. However, if a hearing were held they would introduce evidence to suggest that Windham Heights I and II appear to have a very inefficient heating system. Repair of deficient parts of the system (financed from the reserve replacement fund, not increased rents) could well save fuel costs for the owners and discomfort to the tenants.

Maintenance Costs:

The tenants would like to be able to determine whether the costs chargeable as maintenance salaries for each of the projects were in fact paid, or whether some of the same salaries are being charged on each profit and loss statement.

Director, Housing Management Branch
U.S. Department of Housing and Urban
Development
Re: FHA Project Nos. 017-4416 and 017-44160

July 18, 1975
Page 1 of 1

The tenants would also like to ask questions about the breakdown of maintenance costs. Was any of this a charge to replace inferior original equipment? Which of these costs ought to have been charged against the replacement reserve fund rather than operating expenses?

Depreciation:

The owners' profit and loss statement gives no indication of the kind of depreciation formula used. Depending on the method used, the "loss" may be greater or less in the year shown than it will be in other years. The tenants seriously question the validity of including depreciation figures on a profit and loss statement used to support a rent increase. The owners claim that the value of their property has diminished by these amounts. In fact, in an inflationary economy, the value has probably increased. The owners have suffered no "out of pocket" loss, yet are asking the tenants to suffer a considerable additional "out of pocket" expenditure.

Interest:

From the naked figures in the owners' profit and loss statement, the tenants cannot determine whether the "interest" reflects only that paid by the owners or the portion paid by the federal government as a mortgage subsidy. If the reported figure included the government's share, that amount should be listed as income.

Mortgage Insurance:

The owners claim a considerable amount as an expense for mortgage insurance. The tenants receive no benefit from such insurance. This raises a serious question as to whether such an expense ought to be allowed in determining the need for a rent increase.

Net Loss:

The large sums listed as net loss on the profit and loss statement are, of course, only paper losses. They do not accurately reflect the money benefit received by the owners for the year. In fact, the "net loss" figure is very likely a substantial financial boon to the owners. They will be able to use this figure to offset any other financial gain to diminish their income taxes. Thus, it is to the benefit of the owners to show a loss, not only for purposes of securing the rent increase, but as a tax advantage too.

Director, Housing Management Branch
U.S. Department of Housing and Urban
Development
Re: FMA Project Nos. 017-4416 and 017-44160

July 18, 1975
Page Five.

The tenants believe that if a proper hearing were held, they would be able to pursue the questions raised above. There exists a substantial likelihood that such a hearing would prove that there is no financial justification for the rent increase requested.

In addition to the above questions, the tenants question the kind of consideration given to this rent increase request. The nature of their request makes it appear as though the sole consideration was expediency. The owners seemed to have chosen an arbitrary figure and applied it "across the board."

For example, by applying for an equal dollar amount for all apartments ^{1/} the owners are proposing a greater percentage increase for some apartments than others. There might be some logic to such a plan if the greater percentages were being charged to the apartments demanding greater services. In fact, the opposite is the case. The larger apartments require more utilities and maintenance services (the increased costs of which are used as partial justification for the rent increase) yet they are being charged a smaller percentage increase.

The tenants also question the care that went into the rent increase request because the owners' own figures show that the amount requested was more than the amount necessary to cover the claimed loss. The tenants' attorney was permitted a cursory examination of the owners' narrative in support of the rent increase for Windham Heights I. Included in that narrative was a projected budget for 1975 which showed a loss of approximately \$30,000.00 (thirty thousand dollars). Although the tenants are not willing to accept this as a figure representing the actual state of affairs, it can be accepted for purposes of illustrating a point. The increased revenues from the proposed increase would net the owners \$2,400.00 (two thousand four hundred dollars) per year above the figure they claim necessary to show no loss. Although a careful study of this projected budget was not permitted, it included the owners' maximum 6% profit. Thus, the owners are asking your department to approve an increase which would generate more income than allowed by law!

¹ The amounts are the same except for the one-bedroom apartments in Windham Heights I. The obvious expedient for this was to put them on a parity with Windham Heights II.

Director, Housing Management Branch
U.S. Department of Housing and Urban
Development
Re: FHA Project Nos. 017-4416 and 017-44160

July 18, 1975
Page Six.

The purpose of this letter has been twofold: first, to demonstrate that the tenants' ability to respond to the owners' request for a rent increase is severely limited by the fact that no hearing has been provided and, second, that there is enough question about the financial information submitted by the owners to establish that the rent increase requested is excessive. The tenants reluctantly concede that there is justification for some rent increase. They respectfully suggest that in determining the amount of that increase, your office must consider information which reflects the true financial condition of Windham Heights as well as the financial condition of the affected tenants.

Enclosed with this letter is a copy of a petition by residents of Windham Heights I and II demonstrating their sentiments about the proposed increase.

This office will be more than happy to cooperate with the Department of Housing and Urban Development in this matter.

Very truly yours,
Tenants of Windham Heights I and II

By

Norman K. Janes
Norman K. Janes
Their Attorney

NKJ:sg

cc: Mark Norman, General Manager
Anthony Associates
740 North Main Street
West Hartford, Connecticut

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

VERNICE DUROSE, et al.,
Plaintiffs,

v.

CARLA HILLS, et al.,
Defendants.

Civil Action No.

H-75-303

CLAUDIA WALTER, et al.,
Plaintiffs,

v.

CARLA HILLS, et al.,
Defendants.

Civil Action No.

H-75-345

JANETTE LITTLE, et al.,
Plaintiffs,

v.

CARLA HILLS, et al.,
Defendants.

Civil Action No.

H-75-346

MOTION TO VACATE ORDER
AND DISSOLVE PRELIMINARY INJUNCTION

The federal defendants hereby move the Court to vacate its order and dissolve the preliminary injunction issued on May 27, 1976.

The Court is respectfully referred to the memorandum filed in support of this motion.

Respectfully submitted,

Rex E. Lee

REX E. LEE
Assistant Attorney General
Civil Division

FILED

SEP 27 4 21 PM '75

U.S. DISTRICT COURT
HARTFORD, CONN.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

VERNICE DUBOSE, ET AL :
v. : CIVIL NO. H-75-202
CARLA HILLS, ET AL :

CLAUDIA WALTER, ET AL :
v. : CIVIL NO. H-75-245
CARLA HILLS, ET AL :

JANETTE LITTLE, ET AL :
v. : CIVIL NO. H-75-246
CARLA HILLS, ET AL :

RULING ON MOTION TO VACATE ORDER
AND DISSOLVE PRELIMINARY INJUNCTION

These lawsuits, consolidated for trial, concern the refusal of the Department of Housing and Urban Development ("HUD") and its Secretary, Carla Hills, to implement an operating cost subsidy program, enacted as Section 12 of the Housing and Community Development Act of 1974.^{1/} On

^{1/} This section amended Section 236 of the National Housing Act, 12 U.S.C. § 1715z-1 (Supp. IV, 1974) amending 12 U.S.C. § 1715z-1 (1970). The program provides for the payment of operating subsidies to certain housing projects assisted under Section 236 and may be found at 12 U.S.C. § 1715z-1 (1)(C) or (g) (Supp. IV, 1974). See notes 5 and 6 *infra*.

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December 15, 1975, this court entered a preliminary injunction ordering the implementation of the program.^{2/} On May 27, 1976, the December order was expanded by a ruling converting plaintiffs' original individual classes, which were certified by project, into a statewide class.^{3/} The original compliance date of June 1, 1976, has been extended until September 15, 1976, by several orders of this court.

On August 9, 1976, Congress enacted the "Housing and Urban Development and Independent Agencies Appropriation Act," Public Law 94-378.^{4/} Arguing that the proviso contained in

^{2/} 405 F. Supp. 1277 (D. Conn. 1975). That opinion contains a more exhaustive treatment of the factual background and statutory scheme involved in these actions.

^{3/} On May 20, 1976, a similar nationwide class was certified by Judge Pratt in Underwood v. Hills, Civil No. 76-C-69. However, that class was amended to exclude the Connecticut statewide class on June 7, 1976.

^{4/} Pub. L. No. 94-378 (Aug. 9, 1976) provides in relevant part:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the following sums are appropriated, for the Department of Housing and Urban Development, and for sundry independent executive agencies, boards, bureaus, commissions, corporations, and offices for the fiscal year ending September 30, 1977, and for other purposes, namely:

HOUSING PAYMENTS

For the payment of annual contributions, not otherwise provided for, in accordance with section 5 of the United States Housing Act of 1937, as amended (42 U.S.C. 1437c); for payments

this legislation sheds new light on the issues in this case, the defendants now move to vacate the December and May orders and to dissolve the preliminary injunction. Oral argument was heard on this motion on September 13, 1976.

The Section 235 operating subsidies program is established by 12 U.S.C. § 1715z-1 (f)(3) (1970) (Supp. IV).^{5/} A

4/ cont'd

authorized by title IV of the Housing Act of 1950, as amended (12 U.S.C. 1749 et seq.); for rent supplement payments authorized by section 101 of the Housing and Urban Development Act of 1965, as amended (12 U.S.C. 1701s); for payments as authorized by sections 235 and 236, of the National Housing Act, as amended (12 U.S.C. 1715z, 1715z-1); and for payments as authorized by section 802 of the Housing and Community Development Act of 1974 (88 Stat. 632), \$2,975,000,000: Provided, That excess rental charges credited to the Secretary in accordance with section 235(a) of the National Housing Act, as amended, shall be available, in addition to amounts appropriated herein, for the payments on contracts entered into pursuant to the authorities enumerated above." (Emphasis added to proviso).

5/ 12 U.S.C. § 1715z-1 (f)(3) provides:

"For each project there shall be established an initial operating expense level, which shall be the sum of the cost of utilities and local property taxes payable by the project owner at the time the Secretary determines the property to be fully occupied, taking into account anticipated and customary vacancy rates. At any time subsequent to the establishment of an initial operating expense level, the Secretary is authorized to make, and contract to make, additional assistance payments to the project owner in an amount up to the amount by which the sum of the cost of utilities and local property taxes exceeds the initial operating expense level, but not to exceed the amount required to maintain the basic rentals of any units at levels not in excess of 30 per centum,

source of funds for these operating subsidies is provided by subsection (g) of the same statute which establishes a "reserve fund" comprised of "excess rentals" collected by the Section 235 project owners.^{6/} The central issue throughout

5/ cont'd

or such lower per centum not less than 25 per centum as shall reflect the reduction permitted in clause (ii) of the last sentence of paragraph (1), of the income of tenants occupying such units. Any contract to make additional assistance payments may be amended periodically to provide for appropriate adjustments in the amount of the assistance payments. Additional assistance payments shall be made pursuant to this paragraph only if the Secretary finds that the increase in the cost of utilities or local property taxes, is reasonable and is comparable to cost increases affecting other rental projects in the community."

6/ 12 U.S.C. § 1715z-1 (g) provides:

"The project owner shall, as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be credited to a reserve fund to be used by the Secretary to make additional assistance payments as provided in paragraph (3) of subsection (f) of this section. During any period that the Secretary determines that the balance in the reserve fund is adequate to meet the estimated additional assistance payments, such excess charges shall be credited to the appropriation authorized by subsection (i) of this section and shall be available until the end of the next fiscal year for the purpose of making assistance payments with respect to rental housing projects receiving assistance under this section. For the purpose of this subsection and paragraph (3) of subsection (f) of this section, the initial operating expense level for any project assisted under a contract entered into prior to August 22, 1974, shall be established by the Secretary not later than 180 days after August 22, 1974."

this litigation has been the nature and scope of the Secretary's discretion with respect to the implementation of the operating subsidies program and the expenditure of the reserve fund. The issuance of the preliminary injunction was premised upon this court's conclusion that the implementation of the program and the expenditure of the reserve fund for operating subsidies was mandated by the statute.

The defendants now contend that Public Law 94-378 affects my earlier determinations in two ways. First, they argue that this statute "makes it plain that contract authority is required before any of the amounts contained in the reserve fund may be utilized."^{7/} Secondly, the defendants assert that the recent act entirely transforms the function of the reserve fund by making it available for a variety of programs other than operating subsidies. The essence of both arguments is that the proviso indicates that the Secretary has discretion to refrain from implementing the operating subsidies program and hence affords a basis for vacating the December and May orders and dissolving the preliminary injunction.

I. Contract Authority

The defendants' first contention is a renewal of an argument presented at the time of the December ruling. The Secretary's position is that she requires "contract authority"

^{7/} Federal Defendants' Memorandum in Support of Motion To Vacate Order and Dissolve Preliminary Injunction ("Memo in Support") at 4.

before she may implement the operating subsidies program; that the existing contract authority is limited to 236 and is insufficient to fund all the programs established in Section 236; that she possesses the discretion to allocate the existing contract authority among the several 236 program programs; and that she has reasonably concluded to allocate the existing contract authority to other 236 programs rather than the operating subsidies program.^{8/}

The premise of this argument is that the reserve fund can be spent only pursuant to contract. After consideration of this issue, I reviewed the statutory language and the legislative history and concluded that direct payments can be made out of the reserve fund, not pursuant to any contract and, hence, without reducing the amount available for contract authority.^{9/} However, the dissenters argue that the proviso of Public Law 94-378, which states that the reserve fund shall be available "for the payment of contracts entered into pursuant to the authorities enumerated above" supports their position that the reserve fund cannot be spent pursuant to contract authority.

^{8/} Memo in Support, at 2.

^{9/} 405 F. Supp. at 1287 & n.46. This conclusion is based in part upon the language of (f)(3) which states that the Secretary "to make, and contract to make, financial assistance payments . . ." (emphasis added), and upon the availability of resources in the reserve fund provided by (g).

The defendants place too much weight upon the proviso's reference to contracts. The language merely recognizes that many of the programs enumerated in Public Law 94-378, including interest reduction payments under the Section 235 program, do require the obligation of contract authority prior to the expenditure of appropriations. However, I conclude that the proviso does not indicate that the reserve fund can only be spent pursuant to contract.

There is a second response to the defendants' contract authority argument. In Part IV of the December opinion, I dealt with the possibility that the reserve fund can be spent only pursuant to contract and that the disbursements are subject to the Secretary's allocation of contract authority. While I recognized that such a construction would give the Secretary some discretion, I held that a decision not to implement the program would be contrary to Congressional intent and would constitute an unreasonable exercise of that discretion.^{10/} Thus, even if the proviso did indicate that the reserve fund can only be spent pursuant to contract, this would not provide a basis for vacating the earlier orders or for dissolving the preliminary injunction.

II. Transformation of the Reserve Fund

An important factor underlying the December ruling was the special funding method for the operating subsidies program

^{10/} 405 F. Supp. at 1288-92.

At that time, the reserve fund established by subsection (c) was to be used solely for additional assistance payments under the program. The defendants now argue that the proviso in Public Law 94-378 transforms the function of this reserve fund by giving the Secretary authority to utilize it for a variety of enumerated programs. The contention is that Congress' failure to establish priorities concerning the expenditure of the fund indicates that the Secretary has discretion over its allocation and, therefore, that she is no longer under a mandatory duty to make additional assistance payments directly from the reserve fund. This argument necessitates a study of the legislative intent behind the proviso.

In June 1976, the House Appropriations Committee proposed an appropriation of \$2,975,000,000 for payments for subsidized housing programs. This sum was \$95,000,000 less than the budget request. The reduction was based in part on the making available of the money in the reserve fund for a variety of programs other than the operating subsidies program of Section 236.^{11/} This intent was manifested in the proviso of Public Law 94-378.

In the Senate, Senator Sparkman introduced an amendment which deleted the proviso. In support of this deletion, he stated:

"[T]he Housing Act of 1974 specifically authorized that section 236 funds returned to HUD as

^{11/} H.R. Rep. No. 94-1220, 94 Cong., 2d Sess. 7, (1976).

excess charges should be used to assist section 235 projects which face financial difficulties, because of increased taxes and utility costs. HUD has failed to carry out this provision despite the specific legislative authority conferred 2 years ago, despite the fact that almost \$25 million in excess charges have been returned to HUD, and despite the fact that many projects face financial difficulties and a number have sought remedy under the 1974 provision. . . .

"Several courts have already stated, in cases brought by owners of troubled projects that HUD is required to utilize the returned funds. There are at the present time several judgments against HUD in cases involving more than 20 projects. HUD, however, persists in litigating rather than in obligating the funds authorized under section 235(g)." ^{12/}

Senator Proxmire, floor manager for the bill, concurred with Senator Sparkman.

"I think it is a very good amendment. It is most important that we do our very best to keep the section 235 tax and utility subsidy program going. It is a good program. It is for low-income people.

"All we are asking, as I understand it, is that the money be kept in the program and not distributed elsewhere." ^{13/}

Following these comments, the Senate passed the amendment deleting the proviso. However, the final bill reported by the Conference Committee of the House and the Senate contained the House's proviso. The Conference Report explained the Committee's action as follows:

^{12/} 122 Cong. Rec. S 10775 (daily ed. June 26, 1976).

^{13/} Id.

"Amendment No. 3: Restores language proposed by the House and stricken by the Senate making available any excess rental charges under Section 236(g) of the National Housing Act to liquidate contract obligations for a number of programs under the housing payments account.

"The committee of conference is agreed that this action shall not prejudice any suit now or hereafter before the courts in this area." 14/
(Emphasis added).

The legislative history makes it clear that the proviso enables the Secretary to use the 236(g) reserve fund for other than Section 236 programs. However, it also makes clear that Congress did not intend to allow the Secretary to fail to implement the operating subsidies program. The statements of Senators Sparkman and Proxmire are to this effect, as is the statement in the Conference Report that its action "shall not prejudice any suit . . . in this area." Therefore I conclude that there is no basis for altering my holding that the Secretary is under a mandatory duty to implement the operating subsidies program.

I do recognize, however, that the proviso authorizes the Secretary to use the fund for purposes other than 236 programs after October 1, 1976 (the effective date of Public Law 94-378). To the extent my earlier orders and the preliminary injunction are inconsistent with this fact, it is hereby modified. Thus, the Secretary, in her discretion, is free to spend the Section 236(g) funds on other programs after

^{14/}
H.R. Rep. No. 94-1362, 94 Cong., 2d Sess. (1976). 122 Cong. Rec. H 7685.

October 1. However, that portion of the fund necessary to maintain a full operating subsidies program in Connecticut^{15/} must be so allocated. Only in this way will the relief granted by my earlier orders not be "prejudiced."^{16/}

For the foregoing reasons the defendants' Motion to Vacate the Order and Dissolve the Preliminary Injunction is denied.

SO ORDERED.

Dated at Hartford, Connecticut, this 27th day of September, 1976.

M. Joseph Blumenfeld
M. Joseph Blumenfeld
United States District Judge

^{15/} On August 31, 1976, Circuit Judges Robb and Wilkey of the United States Court of Appeals for the District of Columbia denied defendants' motion for a stay of the district court's order pending appeal in Underwood v. Nills. In so ruling, Judges Robb and Wilkey considered the impact of Public Law 94-378 on that litigation and concluded that "the district court's order does not preclude the Secretary from using the reserve fund to fund programs other than the operating subsidy program, 12 U.S.C. § 1715a-1 (f) (3), to the extent such other funding is authorized in Public Law 94-378." My present ruling reaches a similar result. However, I add that such other payments can be made only if the Secretary's allocation does not "prejudice" the relief granted to plaintiffs in this action.

^{16/} The present ruling is not intended to dispose of the plaintiffs' motion for clarification of my earlier orders. That separate motion is still pending decision. The present ruling is concerned only with the impact of Public Law 94-378 on the relief granted in these actions.

REGULATORY AGREEMENT FOR LIMITED DISTRIBUTION MORTGAGORS
UNDER SECTION 236 OF THE NATIONAL HOUSING ACT, AS AMENDED

Project No.

Mortgagee

Amount of Mortgage Note

Date

Mortgage Recorded:

State

County

Date

Book

Page

This Agreement entered into this _____ day of _____, 19____

between

whose address is

their successors, heirs, and assigns (jointly and severally, hereinafter referred to as Owners) and the undersigned Secretary of Housing and Urban Development and his successors, acting by and through the Federal Housing Commissioner (hereinafter called Commissioner).

In consideration of the endorsement for insurance by the Commissioner of the above described note or in consideration of the consent of the Commissioner to the transfer of the mortgaged property, and in order to comply with the requirements of Section 236 of the National Housing Act, as amended, and the Regulations adopted by the Commissioner pursuant thereto, Owners agree for themselves, their successors, heirs and assigns, that in connection with the mortgaged property and the project operated thereon and so long as the contract of mortgage insurance continues in effect, and during such further period of time as the Commissioner shall be the owner, holder or reinsurer of the mortgage, or during any time the Commissioner is obligated to insure a mortgage on the mortgaged property:

1. Owners, except as limited by paragraph 17 hereof, shall promptly make all payments due under the note and mortgage; provided, however, that the Commissioner shall make payments to the mortgagee on behalf of the Owners in accordance with the interest reduction contract between the mortgagee and the Commissioner.
2. (a) Owners shall establish or continue to maintain a reserve fund for replacements by the allocation to such reserve fund in a separate account with the mortgagee or in a safe and responsible depository designated by the mortgagee, concurrently with the beginning of payments towards amortization of the principal of the mortgage insured or held by the Commissioner of an amount equal to \$ _____ per month unless a different date or amount is approved in writing by the Commissioner. Such fund, whether in the form of a cash deposit or invested in obligations of, or fully guaranteed as to principal by, the United States of America, shall at all times be under the control of the mortgagee. Disbursements from such fund, whether for the purpose of effecting replacement of structural elements and mechanical equipment of the project or for any other purpose, may be made only after receiving the consent in writing of the Commissioner. In the event of a default in the terms of the Mortgage, pursuant to which the loan has been accelerated, the Commissioner may apply or authorize the application of the balance in such fund to the amount due on the mortgage debt as accelerated.
- (b) Where Owners are acquiring a project already subject to an insured mortgage, the reserve fund for replacements to be established will be equal to the amount due to be in such fund under existing agreements or charter provisions at the time Owners acquire such project, and payments hereunder shall begin with the first payment due on the mortgage after acquisition, unless some other method of establishing and maintaining the fund is approved or required in writing by the Commissioner.
- (c) Owners shall establish and maintain, in addition to the reserve fund for replacements, a residual receipts fund by depositing thereto, with the mortgagee, the residual receipts, as defined herein, within 60 days after the end of the semiannual or annual fiscal period within which such receipts are realized. Residual receipts shall be under the control of the Commissioner, and shall be disbursed only on the direction of the Commissioner, who shall have the power and authority to direct that the residual receipts, or any part thereof, be used for such purpose as he may determine.
3. Real property covered by the mortgage and this Agreement is described in Schedule A attached hereto.
4. The Owners covenant and agree that:
 - (a) with the prior approval of the Commissioner, they will establish for each dwelling unit (1) a basic rental charge determined on the basis of operating the project with payments of principal and interest under a mortgage bearing interest at one percent and (2) a fair market rental charge determined on the basis of operating the project with payments of principal, interest and mortgage insurance premiums due under the insured mortgage on the project;

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

VERNICE DUBOSE, et al.,

Plaintiffs,

v.

Civ. No. H-75-303

CARLA HILLS, et al.,

Defendants.

AFFIDAVIT OF HERBERT G. PERSIL

Herbert G. Persil, being duly sworn, deposes and says:

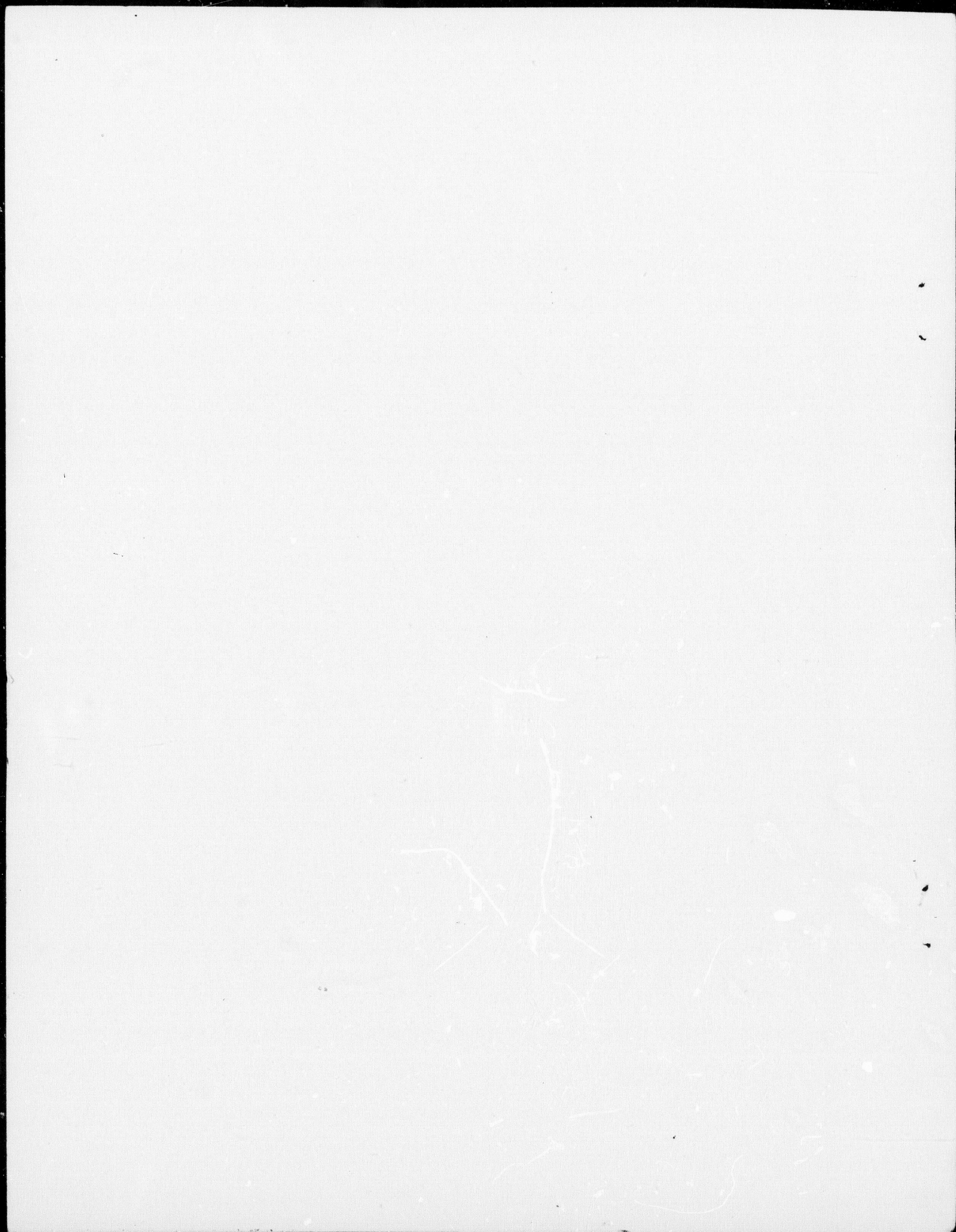
1. I am the Deputy Director of the Office of Budget of the Department of Housing and Urban Development. The principal responsibilities of the Office of Budget are:

- (a) To advise the Assistant Secretary for Administration and other high level officials of the Department, including the Secretary and Under Secretary, on budget matters, including the budgetary implications of policy and legislative proposals;
- (b) To advise Assistant Secretaries and staff officers on their budgetary responsibilities, to evaluate the effectiveness of these activities and to exercise technical and functional supervision with respect to all budget activities throughout the Department; and
- (c) To prepare or review all consolidated or Department-wide budget estimates for submission to the Office of Management and Budget and the Congress.

2. I have read the attached Affidavit of Carla A. Hills which was filed in this case in February, 1976. It is the purpose of this affidavit to up-date the budgetary figures recited in that affidavit. These up-dated figures are based upon Departmental records supplied by the Office of Finance and Accounting and the Assistant Secretary for Housing.

3. According to the official accounting records, as of July 31, 1976, the Department had an unreserved balance of contract authority in an amount aggregating \$37.9 million for contracts authorized by Section 236 of the National Housing Act, as amended. However, as explained in paragraph four (4) of the Secretary's affidavit, this figure is further reduced by program reservations which have been made, but not formally

10 Sep 76 - Aff. Persil

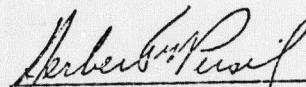


recorded in the official accounting records. The amount of those program reservations is \$3.4 million which would bring the amount of contract authority available for obligation to \$34.5 million.

4. In paragraph 5-A of her affidavit the Secretary estimated that the total cost of honoring outstanding bona fide commitments under the interest reduction program would be \$48.6 million. As of July 31, 1976, the available balance was \$23.3 million. The Secretary also estimated the cost of amendments to outstanding contracts for interest reduction payments to be \$10.3 million. As of July 31, 1976, there was a negative balance of \$6.0 million.


5. In paragraph 5-B of her affidavit the Secretary estimated that the cost of making deep subsidy payments under contracts executed after August 22, 1974, the date of the enactment of the Housing and Community Development Act of 1974, would be \$29 million for the balance of the Fiscal Year 1976 and the transitional quarter ending September 30, 1976. In addition to this sum, the Secretary estimated that the Department would utilize an amount in excess of \$2.9 million to make deep subsidy payments to projects which had received a commitment by the Department for interest reduction payments prior to August 22, 1974, but which were not finally endorsed nor receiving interest reduction payments until after that date. As of July 31, 1976, the available balance was \$17.3 million.

6. In light of these current figures it appears that the Department's unreserved balance of Section 236 contract authority is still insufficient to implement the interest reduction, the deep subsidy and the operating subsidy programs and to permit amendments to outstanding contracts for interest reduction payments, authorized by Section 236.


HERBERT G. PERSIL

Deputy Director, Office of Budget

Subscribed and sworn to before me on this 10th day of Sept., 1976.


NOTARY PUBLIC

My Commission Expires June 30, 1981